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SUPREME COURT, U.S.

NO. 82 6915

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

****

CHARLES WILLIAM BASS,

Petitioner-Appellant

VS.

W. J. ESTELLE, JR., DIRECTOR

TEXAS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee

****

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

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QUESTIONS PRESENTED

I

WHETHER THE EXCLUSION OF PROSPECTIVE JUROR MARIAN HALL VIOLATED THE RATIONALE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), AND ADAMS V. TEXAS, 448 U.S. 38 (1980).

II

WHETHER THE STATE'S "CONTEMPORANEOUS OBJECTION" RULE MAY BE UTILIZED TO CIRCUMVENT THE CONSTITUTIONAL LIMITATION BARRING THE EXCLUSION OF A PROSPECTIVE JUROR ON GROUNDS BROADER THAN THOSE OF WITHERSPOON AND ADAMS.

III

WHETHER THE CONCLUSION OF THE COURT OF APPEALS, BASED UPON THE DICTUM IN HENRY V. WAINWRIGHT, 686 F.2d 311, 314, N. 4, THAT FEDERAL COURTS ARE NOT AUTHORIZED TO ADDRESS CONSTITUTIONAL CLAIMS ON THE MERITS, WHERE A STATE COURT HAS CONSIDERED THEM "WAIVED" FOR FAILURE TO COMPLY WITH STATE PROCEDURAL REQUIREMENTS THAT ARE NOT STRICTLY OR REGULARLY FOLLOWED BY THE STATE COURT, CONFLICTS WITH AND OVERRULES A SETTLED LINE OF DECISIONS BY THIS COURT WHICH HOLD THAT "STATE PROCEDURAL REQUIREMENTS WHICH ARE NOT STRICTLY OR REGULARLY FOLLOWED CANNOT DEPRIVE [THE FEDERAL COURTS]. . . OF THE RIGHT TO REVIEW." BARR V. CITY OF COLUMBIA, 378 U.S. 146, 149 (1964).

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II. Whether the state's "contemporaneous objection" rule may be utilized to circumvent the constitutional limitation barring the exclusion of a prospective juror on grounds broader than those of Witherspoon and Adams.

III. Whether the conclusion of the Court of Appeals, based upon the dictum in Henry v. Wainwright, 686 F.2d 311, n. 4, that federal courts are not authorized to address constitutional claims on the merits, where a state court has considered them "waived" for failure to comply with state procedural requirements that are not strictly or regularly followed by the state court, conflicts with and overrules a settled line of decisions by this Court which hold that "state procedural requirements which are not strictly or regularly followed cannot deprive [the federal courts]. . .of the right to review." Barr v. City of Columbia, 378 U.S. 146, 149 (1964)

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OPINION BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit is reported; Bass v. Estelle, 696 F.2d 1154 (5th Cir. 1983). That court's opinion, denying a motion for rehearing is not yet reported. A copy of the slip opinion is attached as appendix "A".

JURISDICTION

The ruling of the United States Court of Appeals for the Fifth Circuit was entered on February 4, 1983. Petitioner's motion for rehearing was denied on May 19, 1983.

The jurisdiction of this Court is based upon 28 U.S.C., Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and;

2. V.T.C.A. Penal Code, Section 12.31(b).[1]

3. V.T.C.A. Penal Code, Section 19.03(a)(1).[2]

HISTORY OF THE CASE

1. Charles William Bass was convicted of capital murder in the 177th Judicial District Court of Harris County, Texas and was sentenced to death on May 30, 1980.

2. The judgment of conviction and sentence of death were

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1. Section 12.31. Capital Felony.
. . .
(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

2. Section 19.03. Capital Murder.
(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
(1) the person murders a peace officer . . . who is acting in the lawful discharge of his duties and who the person knows is a peace officer . . .

affirmed on direct appeal. Bass v. State, 622 S.W.2d 101 (Tex.Cr.App. 1981), Judges Roberts and Teague dissenting without written opinion, cert. denied, No. 81-6205, 72 L.Ed.2d 491 (1982).

3. The state trial court ordered that Bass be executed before sunrise on August 18, 1982.

4. Bass then exhausted his state habeas corpus remedies on the issues raised herein, his state applications and motions for a stay of execution being dismissed by both the state trial court and the Court of Criminal Appeals of Texas without hearing or written opinion.

5. The United States District Court for the Southern District of Texas denied Bass' petition for writ of habeas corpus and motion for stay of execution without hearing or written opinion on August 17, 1982.

6. Later on August 17, 1982, the Court of Appeals entered an order staying Bass' execution.

7. That same night this Court denied respondent's application to vacate the stay of execution granted by the Court of Appeals.

8. On October 18, 1982, following oral argument on the merits earlier that day, the Court of Appeals entered an order extending the Stay of Execution "until terminated by further order" of the Court.

9. On February 4, 1983, the Court of Appeals denied relief on the issues germane to this petition but ordered the case remanded to the federal district court for an evidentiary hearing on other exhausted issues relating to ineffective assistance of counsel. Bass v. Estelle, 696 F.2d 1154.

10. Bass' motion for rehearing was denied by the Court of Appeals on May 19, 1983. Bass v. Estelle, ___ F.2d ___.

STATEMENT OF THE CASE

Bass was convicted of the capital murder of a peace officer who was acting in the lawful discharge of an official duty and who Bass knew to be a peace officer. V.T.C.A. Penal Code, Section 19.03(a)(1). The jury returned affirmative answers to three special issues, finding that (1) Bass' conduct that caused the death of the officer was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) there is a probability that Bass would commit criminal acts of violence that would constitute a continuing threat to society; and (3) Bass' conduct in killing the officer was unreasonable in response to the provocation, if any, of the deceased.[3] These responses required the court to enter a sentence of death.

SUMMARY OF THE ARGUMENT

Prospective juror Marian Hall was excluded for cause in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. State, 448 U.S. 38 (1980). The Court of Criminal Appeals asserted its contemporaneous objection rule which barred review of the claim on mandatory appeal.

A. The record shows that Ms. Hall was excluded in violation of the Witherspoon and Adams rationale.

B. Because the death penalty is permanent and irrevocable, the procedures by which the State authorizes the execution of one of its citizens is of vital importance to both the defendant and the community, and therefore must be, and appear to be, rigorously fair.

C. The Supreme Court has carefully articulated the legitimate State interest in the selection of a capital jury and has imposed a constitutional limitation upon the State's power to

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3. Articles 37.071(b)(1)(2)(3), Vernon's Ann. Code of Criminal Procedure.

exceed that legitimate interest. The integrity of both the determination of guilt and punishment are undermined if the State begins the proceedings with a "tribunal organized to return a verdict of death."

D. The historical background of the inflexible position taken by the Court of Criminal Appeals in asserting that V.T.C.A. Penal Code, Section 12.31(b) was a valid State ground for exclusion without regard to the Witherspoon limitations, amply discloses adequate cause for trial counsel's failure to object, and the futility of such an objection. The exclusion of Ms. Hall in violation of Witherspoon sufficiently demonstrated the prejudice required under Wainwright v. Sykes, 433 U.S. 72 (1977), and these two factors combined are sufficient to overcome the technical forfeiture concept of Engle v. Isaac, 456 U.S. 107 (1982).

E. Respondent's claim that Bass' failure to object to the exclusion of Ms. Hall constituted an "intentional bypass" of the State procedure for some tactical reason, cannot be resolved without an evidentiary inquiry. This speculation is not supported by the present record.

F. Based upon the rationale of the capital cases decided by this Court, requiring progressively more stringent standards of fundamental fairness at every stage of the proceedings, the Court should adopt the New Hampshire rule that the strict procedure applicable to ordinary criminal trials should yield to broad principles of equity and justice in capital trials.

The Court of Criminal Appeals of Texas, since November 24, 1982, has substantially altered its application of the "contemporaneous objection" rule to jurors wrongfully excluded under the provisions of V.T.C.A. Penal Code, Section 12.31(b).

In Cuevas v. State, 641 S.W.2d 558, 563 (Tex.Cr.App.1982), the Court reversed a capital murder conviction where one prospective juror was excluded under Section 12.31(b), holding that "[w]here a defect of constitutional magnitude has not been

established at the time of trial, the failure of counsel to object does not constitute waiver."

The Court extended Cuevas in Hartfield v. State, 645 S.W.2d 436 (Tex.Cr.App. 1983), rejecting the State's argument on motion for rehearing that the appellant had failed to preserve Adams error by making only a general objection to the veniremen's improper exclusion, even though the Texas court had long held that where only general objections are made, nothing is presented for review. Porter v. State, 623 S.W.2d 374, 378 (Tex.Cr.App. 1981).

The Hartfield holding eliminates application of the Texas "contemporaneous objection" rule to this Court's determination of the Adams-Witherspoon error resulting from the improper exclusion of Mrs. Hall from the Bass jury panel, and prohibits the states execution of the death sentence in this cause. Davis v. Georgia, 429 U.S. 122 (1976).

If the dictum from Henry v. Wainwright, 686 F.2d 311(1982) is extended to mean what the Court of Appeals construes it to mean,[4] then it overrules a settled line of decisions by this Court holding that "state procedural requirements which are not strictly or regularly followed cannot deprive [the federal courts][5] . . . of the right to review," and brings it into irreconcilable conflict with the repeated holdings of this Court that a state court's on-again-off-again application of state forfeiture rules cannot bar federal consideration of the merits of a constitutional claim which the state courts have declared forfeited. This issue was neither focused nor decided in Henry.

The Henry dictum is readily reconcilable with Barr, since Henry's language, read in the context of that case, deals with

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4. Bass v. Estelle, 696 F.2d 1157-1158, fn. 4.

5. Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

the situation where a state court uniformly and consistently applies its procedural rules to decline to entertain an entire class of claimed errors in all cases, not a situation in which a state court entertains identical claims in some cases that it holds forfeited in others under a discretionary power to waive its own rules.

That is precisely the situation here. See Cuevas v. State, 641 S.W.2d 558 (Tex.Cr.App. 1982); Hartfield v. State, 645 S.W.2d 436 (Tex.Cr.App. 1983) on State's Motion for Rehearing, and Ex parte Bravo, ___ S.W.2d ____, [No. 69,046], decided by the Court of Criminal Appeals on December 15, 1982. Compare the state appellate court's treatment of prospective juror Spensley's exclusion with that of Marian Hall, in the very case before the Court.

A R G U M E N T

POINT I

WHETHER THE EXCLUSION OF PROSPECTIVE JUROR MARIAN HALL VIOLATED THE RATIONALE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), AND ADAMS V. TEXAS, 448 U.S. 38 (1980).

POINT II

WHETHER THE STATE'S "CONTEMPORANEOUS OBJECTION" RULE MAY BE UTILIZED TO CIRCUMVENT THE CONSTITUTIONAL LIMITATION BARRING THE EXCLUSION OF A PROSPECTIVE JUROR ON GROUNDS BROADER THAN THOSE OF WITHERSPOON AND ADAMS.

POINT III

WHETHER THE CONCLUSION OF THE COURT OF APPEALS, BASED UPON THE DICTUM IN HENRY V. WAINWRIGHT, 686 F.2d 311, 314, N. 4, THAT FEDERAL COURTS ARE NOT AUTHORIZED TO ADDRESS CONSTITUTIONAL CLAIMS ON THE MERITS, WHERE A STATE COURT HAS CONSIDERED THEM

"WAIVED" FOR FAILURE TO COMPLY WITH STATE PROCEDURAL REQUIREMENTS THAT ARE NOT STRICTLY OR REGULARLY FOLLOWED BY THE STATE COURT, CONFLICTS WITH AND OVERRULES A SETTLED LINE OF DECISIONS BY THIS COURT WHICH HOLD THAT "STATE PROCEDURAL REQUIREMENTS WHICH ARE NOT STRICTLY OR REGULARLY FOLLOWED CANNOT DEPRIVE [THE FEDERAL COURTS]. . . OF THE RIGHT TO REVIEW." BARR V. CITY OF COLUMBIA, 378 U.S. 146, 149 (1964).

ARGUMENT

1. The Witherspoon-Adams Error.

The examination of prospective juror Marian Hall is attached as Appendix "B". Her voir dire followed the pattern noted by the Court in Adams v. Texas, 448 U.S. 38 (1980).

Basically, Ms. Hall fell into the category of prospective jurors who are "unable positively to state whether or not their deliberations would in any way be 'affected'" by the life or death decision confronting them. But, as the Court clearly stated in Adams, 448 U.S. at 50:

> "[N]either nervousness, emotional involvement nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of grounds for excluding [Ms. Hall] were consequently insufficient under the Sixth and Fourteenth Amendments.

Equally insufficient was her concession that:

> the "prospect of the death penalty may affect what [her] honest judgment of the facts will be or what [she might] deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." Ibid.

The transcript of the voir dire examination of Ms. Hall in this case clearly demonstrates that her exclusion for cause

cannot stand under Adams. At no time did she state unequivocally that she could not vote for capital punishment regardless of the evidence. She was excluded solely because she could not swear pursuant to V.T.C.A. Penal Code, Section 12.31(b) that she would not be "affected" in her deliberations by the prospect of the death penalty. Her exclusion clearly violated the mandate of both Witherspoon and Adams.

2. The Texas Contemporaneous Objecton Rule.

Respondent defends on the fact that Bass' trial counsel did not object when Ms. Hall was excused on the State's challenge for cause. This defense takes several avenues, all of which ignore one fundamental concept, aptly described by the Court in Proffitt v. Wainwright, 685 F.2d 1227, 1252-1253 (11th Cir. 1982):

> "Because the death penalty, unlike other punishments, is permanent and irrevocable, the procedures by which the decision to impose a capital sentence is made bring into play constitutional limitations not present in other sentencing decisions. [citations omitted] . . . The view, once prevalent, that the procedural requirements applicable to capital sentencing are no more rigorous than those governing noncapital sentencing decisions [citations omitted] is no longer valid."

Or, as Justice Stevens wrote, concurring in the denial of a petition for writ of certiorari in Coleman v. Belkcom, 451 U.S. 949, (1981), "Because of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review."

These more rigorous constitutional limitations have been applied to other aspects of a capital trial. As recently as Estell v. Smith, 451 U.S. 454, 462-463 (1981), the Court said:

> "We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees."

In Gardner v. Florida, 430 U.S. 349 (1977), a plurality of the Court held that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Due process was violated in that case when the trial judge considered a confidential portion of a presentence investigation report which was not disclosed to defense counsel. This was so even though defense counsel made no objection to the court's action.

Six members of the Court agreed in Presnell v. Georgia, 439 U.S. 14 (1978), that fundemental principles of procedural fairness apply "with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial."

In Green v. Georgia, 442 U.S. 95 (1979), six members of the Court brushed aside a state "hearsay rule" as a violation of the Due Process Clause, where the excluded evidence was highly relevant to a critical issue in the punishment phase of the trial.

This fundamental concept -- never accepted by the Court of Criminal Appeals of Texas -- is common to every step and every proceeding in a capital prosecution.

> "There is a significant constitutional difference between the death penalty and lesser punishments. . . . To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the relaibility of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case." Beck v. Alabama, 447 U.S. 625, 637-638 (1980).

The same rationale applies where a prospective juror is excluded in violation of Witherspoon and Adams, because,

> "the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.

> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death. [emphasis added]. Witherspoon v. Illinois, 391 U.S. at 519-521.

These more rigorous constitutional limitations have been applied to the selection of a capital jury. In Davis v. Georgia, 429 U.S. 122-123, (1976), the Court held:

> "Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings" [citation omitted], he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." [emphasis added]

Justice Rehnquist, dissenting, noted that the Court had established a per se rule that precluded "application of even the harmless error test of Chapman v. California, 386 U.S. 18, (1967)." Id. at 123. Moore v. Estelle, 670 F.2d 56 (5thCir. 1982); Marion v. Beto, 434 F.2d 29 (5th Cir. 1970); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981). The Court of Appeals for the Fifth Circuit held, in Granviel v. Estelle, 655 F.2d at 678, that "[t]he prejudice resulting from the exclusion of a juror in violation of Witherspoon can hardly be questioned in light of decisions such as Davis v. Georgia and Marion v. Beto.

The Court was "ever-mindful of the gravity of a Witherspoon transgression and the consequences of precluding its assertion." Granviel v. Estelle, 655 F.2d at 679.

The ruling that the exclusion of a prospective juror in violation of Witherspoon is prejudicial error per se, follows logically from Witherspoon itself. There the Supreme Court declared, in categorical and uncompromising language, that a jury stripped of persons such as Ms. Hall is no more than "a tribu-

nal organized to return a verdict of death," (391 U.S. at 521-522), "a hanging jury," (id at 523), a jury that "stack[s] the deck" against a man on trial for his life (ibid).

The "constitutional limitations" upon the State's power to sustain procedures designed to obtain a death-oriented capital jury have also been clearly spelled out by this Court.

In Adams, the Court said, 448 U.S. at 47-48:

> ". . . Witherspoon is not a ground for challenging any prospective jurors. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." [emphasis added]

The Court has repeatedly emphasized the State's legitimate interest in obtaining jurors able to follow the law, saying in Witherspoon, 391 U.S. at 522-523:

> "[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." [original emphasis]

After quoting the above statement, the Adams Court said, 448 U.S. at 44:

> "This statement seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths. . .In Boulden v. Holman, 394 U.S. 478, 483-484 (1969), we again emphasized the State's legitimate interest in obtaining jurors able to follow the law." [emphasis added]

See Crawford v. State, 617 S.W.2d 925, 937-939, dissenting opinion Judge Roberts, joined by Judge Phillips; 940-944, dissenting opinion Judge Clinton, joined by Judge Teague (Tex.Cr. App.1981); White v. State, 629 S.W.2d 701, 708-709, concurring opinion Judge Clinton, joined by Judge Teague.

The gravity of the decision to be made by a jury in a capi-

tal trial permeates all stages of the proceedings. The standards erected by this Court arose initially because many State courts neither recognized nor accepted the constitutional imperative that "[D]eath is a different kind of punishment from any other which may be imposed in this country." Gardner v. Florida, 430 U.S. at 357.

The integrity of the determination of guilt and of punishment are undermined if the State begins the proceedings with a "tribunal organized to return a verdict of death." Witherspoon v. Illinois, 391 U.S. at 521-522.

The critical issue, explored by the Court in Woodson v. North Carolina, 428 U.S. 280 (1976), (mandatory death sentence) and in Furman v. Georgia, 408 U.S. 238 (1972), (random selection of those sentenced to die), "involv[ed] the procedure employed by the State to select persons for the unique and irreversible penalty of death." Gardner v. Florida, 430 U.S. 349 362-363, concurring opinion Justice White.

Respondent's first line of defense is the State's "contemporaneous objection" rule, first applied by the Texas Court in Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App.1976), cert. den., 430 U.S. 959 (1977).

Bass claimed on direct appeal that the exclusion of prospective jurors Hall and Spensley violated Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980). Bass v. State, 622 S.W.2d 101, 108-109 (Tex.Crim.App.1981)

The Court of Criminal Appeals took its customary tack in its flexible application of the "contemporaneous objection rule." Apparently feeling that the Spensley voir dire did not reflect Witherspoon error, the Court discussed her responses in detail and then said, at page 109:

> "Spensley's testimony thus reflects she would have voted in such a manner as to avoid the death penalty for appellant without regard to the evidence which might be developed at trial. Under such cir-

> cumstances, she was properly excused under the standards set forth in Witherspoon. See Esquivel v. State, 595 S.W.2d 516. We further note that appellant's failure to object at the time Spensley was excused, preserves nothing for review."

The same complaint about Hall's exclusion was summarily dismissed. Her answers, not discussed by the Court, clearly showed that her exclusion violated the constitutional limitation imposed by Adams, Witherspoon, and Davis v. Georgia, 429 U.S. 122 (1976). The Court said, at page 108:

> "The record reflects that at the time the State's challenge for cause was made and sustained, appellant failed to voice an objection to the court's action. In Crawford v. State, 617 S.W.2d 925, we noted that this Court has consistently held that the failure to object to the alleged improper exclusion of a prospective juror in a capital murder trial, waives the error for purposes of appeal. We find that appellant may not complain of the exclusion of prospective juror Hall for the first time on appeal. See White v. State, 610 S.W.2d 504; Boulware v. State, 542 S.W.2d 677."

There can be no "evenhanded, rational and consistent imposition of death sentences under law" Jurek v. Texas, 428 U.S. 262, 276 (1976), where the Court of Criminal Appeals applies its "contemporanous objection rule to exclude consideration of Witherspoon and Adams violations when the Court's examination of the record obviously shows such errors, and to disregard the "contemporaneous objection" rule when its examination of the record reveals no such error. See specifically Russell v. State, 598 S.W.2d 238, 247 (Tex.Crim.App.1980), where the Court said:

> "The record reflects that appellant did not object when this juror was excused nor did he even request to examine her. As such, this failure to object waives any error. [citations omitted] Even though error is not preserved for review, we note that the record supports the conclusion that this prospective juror was disqualified under the doctrine of Witherspoon. Appellant's second ground of error is overruled. [emphasis added].

This same approach was utilized by the Court of Criminal Appeals in Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App. 1980). The point of error relating to prospective juror Nelson, obviously excluded in violation of Adams v. Texas, 448

U.S. 38 (1980), was rejected under the contemporantous objection rule because trial counsel made no objection when Nelson was improperly excused. An additional point of error relating to prospective juror Guidry was considered on the merits and after such consideration the Court ruled that her exclusion violated neither Adams nor Witherspoon before adding that appellant's failure to object at the time Guidry was excused, preserved nothing for review. Esquivel v. State, 595 S.W.2d 516 (Tex.Crim. App.1980).

Under the legislative and constitutional mandate for uniform application of death sentences, the Texas Court may not disregard its own rules in some cases and rigidly enforce them in others, depending solely upon whether the voir dire record reflects a violation of Witherspoon and Adams or not.

The State Court's treatment of the two prospective jurors in this case, and the similar treatment of those in Russell and Esquivel does not "enable [this Court] to say that the [Texas] court has so consistently applied its ["contemporaneous objection"] requirement as to amount to a self denial of the power to entertain the federal claim here presented if the [Court of Criminal Appeals] desires to do so. See Henry v. Mississippi, 379 U.S. 443 (Black, J., dissenting). Such a rule, more properly deemed discretionary than jurisdictional, does not bar review (by the Federal Courts)." Sullivan v. Little Hunting Park, 396 U.S. 229, 233-234 (1969). See Williams v. Georgia, 349 U.S. 375 (1955).

Another critical factor, ignored by the Texas Courts, was stated by this Court in Gardner v. Florida, 430 U.S. at 357-358:

> "From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Selection of an impartial jury comprising a fair cross-section of the citizens who can meet the Witherspoon and Adams standards, is the first step in the ultimate decision to impose a death sentence based on reason, rather than bias, caprice or emotion.

In a belated effort to establish a colorable "State interest" in its summary and selective use of the contemperaneous objection rule as applied to jury selection in capital cases, the Court of Criminal Appeals ruled in Crawford v. State, 617 S.W.2d 925, 940 (Tex.Crim. App.1981):

> "In order for this Court to excuse appellant's failure to object to [prospective juror] Stulce's exclusion, we would be required to assume that the prospective juror was acceptable to appellant in every respect and negate the possibility that appellant looked with favor on the court's action in excusing the venireman. Such an assumption would further require speculation that appellant would not challenge her for cause under Art. 35.16, V.A.C.C.P., and that he found Stulce's age, sex, race, occupation, religious preference, marital status, prior jury service etc., acceptable to the extent that he would not have used a peremptory strike against her. Even if we speculate that appellant would not have challenged Stulce for cause or exercised a peremptory challenge on her, we cannot assume that he would have desired to have her as one of the twelve jurors (from the entire panel) who was to render a verdict in his case. We cannot conclude that the only reason appellant failed to object to the exclusion of Stulce was the as yet unestablished defect as found in Adams v. Texas, supra."

All of the above authorities are relevant to the critical holding in Henry v. Mississippi, 379 U.S. 443, 447-448 (1965) that "[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistance on compliance with its procedural rule serves a legitimate state interest."

The State's insistance on compliance with its contemporaneous objection rule hardly serves a legitimate state interest based upon the paltry speculation improvised in Crawford v. State, supra.

Crawford v. Texas, 617 S.W.2d 925 (Tex.Crim.App.1980), decided three weeks after the Adams decision, is significant for its treatment of the "futility" argument upon which Respondent places great reliance, because there the majority elected to follow the "legiti-

mate State interest" concept from Henry, and rejected application of the "futility" doctrine.

The Court's original opinion summarily rejected Crawford's Witherspoon claim, holding that his failure to object to the improper exclusion of a potential juror waived such error on appeal. id. at 932.

In his dissent to this ruling, Judge Roberts squarely addressed and rejected the "futility" argument, saying at page 938:

> "[T]he Court can impose this waiver doctrine only by talking out of both sides of its constitutional mouth. On October 6, 1976, we held that there was no merit to an objection that it was improper to excuse a Witherspoon-qualified juror on the broader grounds of Section 2.31(b). Moore v. State, 542 S.W.2d 664 (Tex.Crim.App.). Jury selection in this case began six months later (April 11, 1977). Now the Court holds that the appellant was at fault for not raising an objection that we had six months earlier held to be legally worthless. At the least it is ungracious of us to require defense counsel to recognize merit in an argument when we could not; at worst, it denies him due process and due course of law on appeal. It is tantamount to saying that our opinions on constitutional law are so notoriously untrustworthy that attorneys are not justified in following them."

It was in response to this dissent that the majority introduced the "legitimate State interest" holding on rehearing, enumerating the various speculative considerations with which the Court would be faced should it sustain a Witherspoon violation where no objection was made. It thus appears that the Court of Criminal Appeals has not and does not rely upon the "futility" doctrine but has, instead, squarely based its continued rejection of Witherspoon on the "legitimate State interest" concept."

Respondent advances the Crawford "legitimate State interest" speculation, theorizing that Bass' trial counsel may have deliberately withheld interposing a Witherspoon objection to Ms. Hall's exclusion as a matter of trial strategy, and argues that relief should be denied on this basis. (See Respondent's Opposition to Stay of Execution and Brief on Appeal at 5).

The trial record does not support this assertion. The reason for trial counsel's failure to object to the unwarranted exclusion of Ms.

Hall is not apparent from the record and can be determined only by an evidentiary hearing, if this Court deems that the State's interest in obtaining a "hanging jury" in violation of Witherspoon exceeds the interests of both Bass and society in general, and that it outweighs the stringent procedural safeguards erected by this Court at every stage of the proceedings in a capital prosecution.

It cannot be inferred from the record as it now stands that Bass' trial counsel knowingly and deliberately withheld a Witherspoon objection for strategic reasons.

3. "Deliberate Bypass" and "Automatic Forfeiture" Doctrines.

Respondent's argument confuses two separate doctrines under which a forfeiture of federal constitutional rights may occur in a state criminal proceeding. The first is the "deliberate bypass" doctrine in Henry v. Mississippi, 379 U.S. 443 (1965) and Fay v. Noia, 372 U.S. 391 (1963). The second is the doctrine of Davis v. United States, 411 U.S. 233 (1973), Francis v. Henderson, 425 U.S. 536 (1976), Engle v. Isaac, supra; and Wainwright v. Sykes, 433 U.S. 72 (1977), that, in addition to a "deliberate bypass," a mere technical failure to comply with applicable state procedural rules in raising a federal constitutional claim may constitute forfeiture or "waiver."

The "automatic-forfeiture" doctrine is inapplicable where the validity of Witherspoon objections have been uniformly and repeatedly rejected by the Court of Criminal Appeals.

Respondent's suggestion of a deliberate bypass is not relevant to the Isaac doctrine. Instead, it raises an independent issue of forfeiture which must be adjudicated under the settled principles applicable to that issue. And, as Henry v. Mississippi demonstrates, 379 U.S. at 450-452, those principles do not attach a forfeiture to a simple failure to object. They require an evidentiary inquiry --not mere speculation -- into the reason for counsel's failure to object.

Respondent, aside from his "deliberate bypass" contention, relies heavily upon Engle v. Isaac, 456 U.S. 107, (1982), as indeed he must considering the adamant stands taken by the Court of Criminal Appeals

until recently against implementation of the Witherspoon standards. A brief review of its undeviating position was recounted by the Court in Burks v. State, 583 S.W.2d 389 (Tex.Crim.App.1979), where the Court considered the appellant's complaint about the trial court's action in excluding prospective jurors who were disqualified under Section 12.31(b) without first determining whether they were qualified under Witherspoon. The Court said, at 393-394:

> In a capital murder case, a prospective juror may be disqualified under either Witherspoon or Section 12.31(b), or both. Bodde v. State, 568 S.W.2d 344 (Tex.Crim.App.1978) [certiorari denied, 440U.S. 968, (1979)]; Brock v. State, 556 S.W.2d 309 (Tex. Crim.App.1977) [certiorari denied, 434 U.S. 1002, 1978]; Moore v. State, 542 S.W.2d 664 (Tex.Crim. App.1976) [certiorari denied, 431 U.S. 949 (1977)]. A prospective juror who is disqualified under Witherspoon need not be disqualified or even questioned under Section 12.31(b); conversely, a prospective juror who is disqualified under Section 12.31(b) need not be disqualified or questioned under Witherspoon. Bodde v. State, supra; Hughes v. State, 563 S.W.2d 581 (Tex.Crim.App.1978) [certiorari denied, 440 U.S. 950, (1978)]; Hughes v. State, 562 S.W.2d 857 (Tex.Crim.App.1978) [certiorari denied, 439 U.S. 903, (1978)]; Burns v. State, 556 S.W.2d 270; Moore v. State, supra. "Further, appellant's contention that Section 12.31(b) is unconstitutional in light of Witherspoon v. Illinois, has been decided adversely to him. This Court has consistently held that the statutory scheme for the selection of jurors in capital cases in Texas comports with the constitutional requirements of Witherspoon. Adams v.State 577 S.W.2d 717 (Tex.Crim.App.1979); Hughes v.State 562 S.W.2d 857, supra; Hughes v. State, 563 S.W.2d 581, supra; Freeman v. State, 556 S.W.2d 287, (Tex.Crim.App.1977) [certiorari denied, 434 U.S. 1088 (1978); Burns v. State, supra; Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App.1976) [certiorari denied, 430 U.S. 959, rehearing denied, 431 U.S. 926 (1977)]; Moore v. State, supra."

This Court denied certiorari in Burks with its compilation of the settled Texas law, 448 U.S. 907 (1980).

See Shippy v. State, 556 S.W.2d 246 (Tex.Crim.App.1977), certiorari denied, 434 U.S. 935 (1978); Hovila v. State, 562 S.W.2d 243 (Tex.Crim.App.1978), certiorari denied, 439 U.S. 1135 (1978); Duffy v. State, 567 S.W.2d 197 (Tex.Crim.App.1978), certiorari denied, 439 U.S. 991 (1978); Chambers v. State, 568 S.W.2d 313 (Tex.Crim.App. 1978), certiorari denied, 440 U.S. 928 (1978); White v. State, 591 S.W.2d 851 (Tex.Crim.App.1979)

The Court's continued rejection of the Witherspoon constitutional

limitations is easily documented. Even after this Court's panel decision in Burns v. Estelle, 592 F.2d 1297 (1979) en banc, 626 F.2d 396 (1980), the Court of Criminal Appeals stated: "We are aware of the panel opinion in [Burns], which case is now pending rehearing en banc. We, however, adhere to our earlier holdings:" White v. State, 591 S.W.2d 851, 856-857 (Tex.Crim.App.1980).

In Loudres v. State, 614 S.W.2d 407, 408 (Tex.Crim.App.1980), the Court reluctantly reversed a capital conviction because prospective jurors were excluded on the basis of V.T.C.A. Penal Code, Sec. 12.31 (b), and the trial court foreclosed inquiry of whether their exclusion comported with Witherspoon. Writing for the majority, Judge Dally said:

> "Although a majority of this Court might well agree that Mr. Justice Rehnquist, in his dissenting opinion, states the proper view that Texas should be permitted under the Constitution to require each juror to swear that he or she will answer the punishment questions in a capital case without regard to their cumulative consequences, we must adhere to and implement the majority opinion, which is now the law."

Judge Phillips [who is no longer on the Court] "emphatically disassociat[ed] [himself] from the majority opinion's implicit endorsement of Mr. Justice Rehnquist's dissent in Adams, adding at page 410:

> "As a factual matter, Section 12.31(b) of our penal code routinely operates to deny the capital defendant his right to a fair and impartial jury under the Sixth and Fourteenth Amendments. Section 12.31(b) does this by eliminating from the jury all persons except those who have no qualms about sending a defendant to his death. As a result, capital juries in Texas have been unacceptably prone to administer death verdicts . . . Neither this Court nor any other state court 'should be permitted' to apply its law so as to deny a criminal defendant his right to a fair jury."

Again in Lackey v. State, --- S.W.2d ---, No. 61,094 (Tex.Crim. App. decided September 15, 1982), Judge Dally, writing for a unanimous Court in reversing a capital conviction on Adams grounds, said in a footnote, this time without demurrer from any member of the Court: "The author of this opinion of course agrees with Mr. Justice

Rehnquist that the majority of the Supreme Court was wrong in Adams v. Texas, supra."

Even the defendant who did object, and thus ostensibly surmounted the contemporaneous objection rule, was greeted with further technical refinements by the Court of Criminal Appeals. In May v. State, 618 S.W.2d 333, 349 (Tex.Crim.App.1981), the Court still refused to follow the Witherspoon standards, even after Adams was decided.

There the majority reached the following conclusion:

> "A careful review of the record reflects that no specific objections were made by appellant to the State's challenge for cause that any of the prospective juror's exclusion were inconsistent with Witherspoon v. Illinois, 391 U.S. 510 (1968). Rather, appellant's objections were directed to the disqualification of the jurors under V.T.C.A. Penal Code, Sec. 12.31(b). We find that the appellant's failure to specify in his objections that the juror's exclusions were inconsistent with Witherspoon waived such error on appeal.[emphasis added]

This Court vacated the judgment and remanded the case to the Court of Criminal Appeals "for further consideration in light of Adams v. Texas, 448 U.S. 35 (1980)." May v. Texas, 454 U.S. 959 (1981).

It is apparent from the foregoing review of the Texas case law that (1) the Court of Criminal Appeals ultimately based its stubborn opposition to a common-sense interpretation of Witherspoon and the grave issues there at stake, upon a "legitimate State interest" in foreclosing inquiry into Witherspoon and Adams violations. The collateral doctrine based upon the futility of an objection by trial counsel, vigorously raised by Judge Roberts, dissenting in Crawford, was rejected by the Court; (2) however, "[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistance on compliance with its procedural rules serves a legitimate state interest." Henry v. Mississippi, 379 U.S. 443, 447-448 (1965); (3) the State has no overriding interest in obtaining in capital cases "tribunal[s] organized to return a verdict of death." Witherspoon, 391 U.S. at 521-522. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and

reason rather than caprice and emotion." Gardner v. Florida, 430 U.S. at 357-358. It would thus appear that any purported legitimate State interest must be balanced with those of the defendant and of society, because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action." Ibid.

The Supreme Court of New Hampshire has fashioned a sound rule where a defendant fails to make a futile contemporaneous objection in a capital murder trial. In State v. Nelson, 196 A.2d 52, (1963), the Court, after observing that under both state and federal law as it existed at the time of trial, it would have been futile for the defendants to object to the physical evidence then offered, said, at page 57:

> "Considering the circumstances which existed, the failure of defendants' counsel to object to the introduction of this physical evidence is understandable. In view of the seriousness of the charges against these defendants we have considered the objections to the introduction of this evidence as if seasonably taken.

The Nelson Court based its decision on State v. Long, 4 A.2d 865; 6 A.2d 752 (N.H.Sup.Ct.1939) where the Court held that "the strict rules of procedure applicable to ordinary trials should yield to 'broad principles of equity and justice'" in a capital trial.

The New Hampshire holdings are in accord with the successive decisions by the Supreme Court.

In Engle v. Isaac, 456 U.S. at 134, the case primarily relied upon by Respondent, the Court noted that "principles of comity and finality [,] . . . [i]n appropriate cases. . . [,] must yield to the imperative of a fundamentally unjust incarceration." Those principles must yield to the imperative of a fundamentally unjust death sentence imposed by a "hanging jury" in death cases, where this Court has consistently demanded especially exacting standards of fairness. Enmund v. Florida, --- U.S. ---, 73 L.Ed.2d 1140 (1982); Eddings v. Oklahoma, 455 U.S. 104 (1982); Estelle v. Smith, 451 U.S. 454 (1981); Adams v. Texas, supra; Bullington v. Missouri, 451 U.S. 430

(1981); Beck v. Alabama, 447 U.S. 625 (1980); Godfrey v. Georgia, 446 U.S. 420 (1980); Green v. Georgia, supra; Presnell v. Georgia, supra; Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978); H. Roberts v. Louisiana, 431 U.S. 633 (1977); Gardner v. Florida, supra; Davis v. Georgia, supra; Woodson v. North Carolina, supra; S. Roberts v. Louisiana, 428 U.S. 325 (1976).

This Court has never utilized procedural defaults to prevent the granting of relief under Witherspoon. To the contrary, it has twice set aside death sentences on Witherspoon grounds in cases where the state courts had expressly relied upon counsel's failure to object as a basis for denying relief. Wigglesworth v. Ohio, 403 U.S. 947 (1971), rev'g State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607, 614 (1969); Harris v. Texas, 403 U.S. 947 (1971), rev'g Harris v. State, 457 S.W.2d 903, 912 (Tex.Crim.App.1970). In reversing Wigglesworth and Harris, the Court cited not only Witherspoon but also Boulden v. Holman, 394 U.S. 479 (1969) and Maxwell v. Bishop, 398 U.S. 262 (1970). In both Boulden and Maxwell trial counsel similarly did not object to the exclusion for cause of venire members with scruples against capital punishment.

While the State may argue that these cases pre-dated Francis v. Henderson, 425 U.S. 536 (1976) (waiver of pre-trial objection to composition of Grand Jury), and its progeny, the fact is that subsequent to Francis the Court has repeatedly declined to reject constitutional claims in death cases on grounds of procedural forfeiture. See Gardner v. Florida, 430 U.S. at 361 (trial counsel's failure to request access to full pre-sentence report did not waive constitutional error in State's failure to disclose its contents); Estelle v. Smith, 451 U.S. at 468, n. 12, aff'g Smith v. Estelle, 602 F.2d 694, 708 n. 19 (5 Cir.1979) (trial counsel's failure to interpose Fifth and Sixth Amendment objections did not waive constitutional error in State's use of psychiatric testimony obtained in violation of defendant's Fifth and Sixth Amendment rights); Eddings v. Oklahoma, 455 U.S. at 120 and n. 1 (dissenting opinion of the Chief

Justice) (relief granted on Eighth Amendment claim not rasied in the State trial court). Cf. Beck v. Alabama, 447 U.S. at 647-648 (dissenting opinion of Justice Rehnquist) (relief granted on Due Prccess and Eighth Amendment claim not preserved before State Supreme Court.

The Respondent relies upon the following statement from Engle v. Isaac, 456 U.S. at 130:

> "We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes." [Emphasis added].

Engle v. Isaac, involved only one colorable constitutional claim. It cannot be broadly construed as a per se bar to an issue involving a fundamental constitutional limitation on a State's power to impose a death sentence upon a defendant in violation of Witherspoon. See Davis v. Georgia, supra. While the applicability of Isaac may not depend upon the type of claim raised by a prisoner, "the nature of a constitutional claim may affect the calculation of cause and actual prejudice." Ibid.

Ms. Hall's exclusion was prejudicial per se and was not harmless error. Davis v. Georgia, supra; Granviel v. Estelle, supra. This meets the "prejudice" prong of the test articulated in Wainwright v. Sykes, 433 U.S. 72 (1977). The second Sykes prong -- a showing of cause for the default or noncompliance, is supported by Bass' summary of the prevailing Texas case law.

In Wainwright v. Sykes, 433 U.S. at 90, the Court said:

> "If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection."

Applying this homily to the Texas procedure as it stood on April 22, 1980, when the jury selection began, Bass' counsel had the intelligence from Burks v. State, 583 S.W.2d at 393-394, (decided on April

11, 1979), that under the State procedure, a prospective juror who is disqualified under Section 12.31(b) need not be disqualified or even questioned under Witherspoon. If Witherspoon questioning was not required by the State procedure, it could logically be assumed that no Witherspoon objection was required.

Because of the stubborn adherence by a majority of the Court of Criminal Appeals to its unconstitutional application of Section 12.31 (b), the purported abuses of the Writ of Habeas Corpus, presumably committed only by defense counsel in criminal cases, are chargeable directly to the State in the instant case and in all other cases involving the State's abuse of power in its studied efforts to circumvent the constitutional limitations upon jury selection in capital cases.

Bass' failure to make a meaningless objection when Hall was improperly excluded "cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the dispostion of the case. If this is so, and the enforcement of the rule here would serve no substantial state interest, then settled principles would preclude treating the state ground as adequate; giving effect to the contemporaneous objection rule for its own sake 'would be to force resort to an arid ritual of meaningless form.'" [citations omitted]. Henry v. Mississippi, 379 U.S. at 449.

The constitutional error occurred when the trial court granted the State's challenge for cause to prospective juror Hall under Section 12.31(b). Respondent argues that Bass' counsel failed to object to the exclusion of Hall, thereby waiving the Witherspoon standards. This ignores the fact that an objection at that time would have been fruitless. It was too late to save the trial and sustain the validity of the jury selection, with or without an objection. "Therefore the whole purpose of the contemporaneous objection rule is thwarted by arguing that it applys here. There was adequate cause for noncompliance with the contemporaneous objection rule." "No plausible advantage derived from defendant's failure to object" at that time. Cf., Harris v. Spears, 606 F.2d 639 (5 Cir.1979). It is inconceiv-

able that competent defense counsel would desire the exclusion of a potential juror such as Ms. Hall.

While as a general proposition, contemporaneous objections may encourage state courts to re-examine prior decisions (See Respondent's Opposition to Stay of Execution and Brief on Appeal to the Court of Appeals at page 6), that concept had little meaning when measured against the reality of the unyielding stance of the Court of Criminal Appeals against the constitutional limitation on its power to authorize "capital juries . . . [that are] unacceptably prone to administer death verdicts." Loudres v. State, 614 S.W.2d 407, 408 (Tex.Crim.App.1980) (Concurring opinion by Judge Phillips).

The exclusion of Ms. Hall deprived Bass of the very sort of venire member whose exclusion Witherspoon was designed to prevent -- a juror who, despite qualms about capital punishment, was capable of serving fairly and honestly. To hold that petitioner may be sentenced to death by a jury stripped of such persons, merely because his counsel failed to interpose a meaningless objection that was doomed to failure in both the trial and the appellate court, and, until Adams, in the Supreme Court, would seriously undermine the policy underlying Witherspoon and its recent sweeping reaffirmation by an 8-1 vote in Adams. This is particularly true where the Court of Criminal Appeals has rejected the "futility" doctrine in favor of a "legitimate State interest" concept. Use of such a super-technical rule of procedural forfeiture to defeat an obviously valid Witherspoon/Adams claim would also run contrary to the basic policy underlying all Supreme Court decisions in capital cases since 1976:

> "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Woodson v. North Carolina, 428 U.S. at 305 (plurality opinion). That policy was eloquently restated recently in Gholson v. Estelle, 675 F.2d 734, 737 (5 Cir.1982):

> "There is no doubt this Court and the Supreme Court recognize the death penalty as a qualitatively different form of punishment than any other that can be imposed. [citations omitted]. . .It is different from all other punitive measures in that it is the most severe and exacting disciplinary mechanism available to a society that considers itself civilized and decent. In addition, the termination of human life is the most final and decisive method for inflicting a penalty that can be conceived. It is precisely the inflexible and terminal nature of the death penalty that makes it a matter of exceeding consequence to assure that before such a condemnation is made the individual receives the full force of the protections and safeguards guaranteed by the Constitution."

To send Charles William Bass to his death after depriving him of the opportunity to have Ms. Hall on the jury simply cannot be squared with these concepts. The judgments of the Courts below should be reversed.

4. Recent Modifications of the Contemporaneous Objection Rule by the Court of Criminal Appeals of Texas.

The Court of Appeals found that "[w]ere we required to reach a final conclusion, we might incline to view that [Mrs. Hall's] dismissal was improper." 696 F.2d 1154; and "Judge Gee intimates strongly that if he were a free agent he would hold that veniremen Hall should not have been excused." Judge Goldberg, specially concurring.

Because appointed counsel made no objection when Mrs. Hall was excluded, the Court below found that Bass "waived" any objection to the Witherspoon [and Adams] violations. Reliance was had upon the "contemporaneous objection" rule, imposed by the Texas courts in all cases decided after Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976).

After Bass was argued and submitted on accelerated review to the Court of Appeals, the Court of Criminal Appeals of Texas has modified its untenable position on application of V.T.C.A. Penal Code, Section 12.31(b), to cases tried after Boulware and before Adams.

In Cuevas v. State, 641 S.W.2d 558 (Tex.Cr.App.1982), the Texas Court reversed a capital murder conviction where the State argued that the appellant did not properly object to the exclusion of an

Adams qualified venireman, saying at page 563:

> "[A]t the time of this trial our case law made it abundantly clear that an objection to a Sec. 12.31(b) exclusion on Witherspoon grounds would be futile.
> "Where a defect of constitutional magnitude has not been established at the time of trial the failure of counsel to object does not constitute waiver. Ex parte Sanders, 588 S.W.2d 383."

On January 26, 1983, the Court of Criminal Appeals of Texas denied the State's motion for rehearing in a capital murder case previously reversed for an Adams violation, and extended the Cuevas holding to a prospective juror improperly excluded under Section 12.31(b) where no valid objection to the trial court's action had been made by defense counsel. Hartfield v. State, 645 S.W.2d 436 (Tex.Cr.App. 1983).

> "The State now maintains that while appellant's trial counsel made 'an exception' to the court's ruling, this constituted nothing more than a general objection and he therefore waived any "possible error. We do not agree. It must be kept in mind that the voir dire examination in question took place in June of 1977, three full years prior to the June 1980 decision is Adams, supra. Therefore, at the time Hlozek was excused, Sec. 12.31(b) was considered constitutional even to the extent that it allowed exclusion of prospective jurors on a broader ground than Witherspoon, supra, and consequently there was no reason for appellant's counsel to strenuously attempt to preserve his error. We find that appellant did not waive his error."

The Court added, in footnote 1:

> "Our present holding obviously applies only to cases in which voir dire examination took place prior to the holding in Adams, supra. In cases subsequent to Adams, the contemporaneous objection rule continues to apply to the preservation of error during voir dire examination. Additionally this holding is made in light of the United States Supreme Court's disposition of May v. State, 618 S.W.2d 333 (Tex.Cr.App.1981), vacated in May v. Texas, 454 U.S. 959 . . . (1981), on remand May v. State, 632 S.W.2d 751 (Tex.Cr.App. 1982)." [original emphasis]

In May v. State, 618 S.W.2d 333, 349 (Tex.Cr.App.1981), the majority opinion rejected appellant's claim that prospective juror Schlosser had been excluded in violation of Adams, saying:

> "A careful review of the record reflects that no specific objections were made by appellant to the State's challenge for cause that any of the prospective juror's exclusion were inconsistent with Witherspoon v. Illinois, 391 U.S. 510 (1968). Rather, appellant's objections were directed to the disqualification of the jurors

> under V.T.C.A. Penal Code, Sec. 12.31(b). We find that the appellant's failure to specify in his objection that the juror's exclusions were inconsistent with Witherspoon waived such error on appeal."

The Court of Criminal Appeals has consistently ruled, prior to Hartfield, that the failure of a capital murder defendant to base his objections to the excusing of jurors upon Witherspoon grounds, and to make only "general objections" presented nothing for review. See, eg., Porter v. State, 623 S.W.2d 374, 378 (Tex.Cr.App.1981). Porter was based upon the May decision, a case in which the death sentence was vacated by the Supreme Court. See Aliff v. State, 627 S.W.2d 166 (Tex.Cr.App.1982); Carr v. State, 600 S.W.2d 816 (Tex.Cr.App. 1980); and Miller v. State, 566 S.W.2d 614 (Tex.Cr.App.1978).

In both Simpson v. State, 507 S.W.2d 530, 534 (Tex.Cr.App.1974) and Russell v. State, 468 S.W.2d 373, 374-375 (Tex.Cr.App.1971) the Court held that "a general objection . . . is like no objection at all."

On December 15, 1982, the Court of Criminal Appeals granted an application for writ of habeas corpus in a capital murder case that it had previously affirmed on direct appeal. Ex parte Bravo, -- S.W.2d -- , [No. 69,046] (Tex.Cr.App.1982). The case is still before the court on a second motion for rehearing.

Bravo asserted in his application for the writ that a prospective juror was erroneously excused by the trial court, over the "exception" of defense counsel, a claim that was neither raised on direct appeal nor discussed by the Court. Bravo v. State, 627 S.W.2d 152 (Tex.Cr.App.1982).

The Court, with three judges concurring because the record revealed that not one but three and possibly six more prospective jurors were excluded in violation of Witherspoon, and with two judges who joined in granting the writ dissenting because the conviction and sentence were set aside and the conviction was not affirmed and the sentence reformed to life imprisonment, said:

> "[E]rror rising to the level of constitutional error may be raised for the first time in a post-conviction application for writ of habeas corpus even though not raised in the direct appeal. The excusal of the venireperson, Madrigal, was predicated upon the trial court's

> sustaining a challenge for cause made by the prosecuting attorney. We find the excusal was constitutionally and legally impermissible and will grant the application."

The Court found that the questioning of Madrigal "simply did not go far enough to disqualify her for cause." When she finally stated that she could not say whether the potential death sentence would affect her deliberations, the trial judge said: "I believe I will excuse you." Defense counsel responded: "Note our exception to that ruling, please." The Court noted: "Clearly, the premature and legally impermissible excusal of Madrigal constitutes 'Adams error.'. . [She] was prematurely and improperly excused by the trial court."

The cited cases, under the latest concept of the contemporaneous objection rule imposed by the Court of Criminal Appeals, dictate the following conclusions: (1) a general objection is equivalent to no objection at all; (2) under Hartfield there was no reason, at the time voir dire was conducted, for defense counsel to "strenously attempt to preserve his error, and (3) under Cuevas the Adams constitutional defect had not been established when Bass was tried, so the failure of counsel to object did not constitute waiver; and finally, as virtually conceded in original decision by the Court of Appeals, Marian Hall was excluded in violation of Witherspoon and Adams. There being no "waiver" by Bass, his sentence of death must be set aside. Davis v. Georgia, supra.

Even if these conclusion be too broad under the Hartfield and Cuevas holdings, the narrower conclusion dictated by May is applicable. Defense counsel's examination of Mrs. Hall clearly revealed that his rehabilitative efforts were based upon both Adams and Witherspoon. May v. State, 618 S.W.2d 333, at 350 dissenting opinion by Judge Clinton (Tex.Cr.App.1981); see Zillender v. State, 557 S.W.2d 515 (Tex.Cr.App.1977).

When the Bass application for a writ of habeas corpus was presented to the Court of Criminal Appeals of Texas, that Court still maintained its adamant stand through the contemporaneous objection rule against granting relief for Adams and Witherspoon errors.

The decisions of the court below were based upon its broad reading of Engle v. Isaac, supra, in light of the Texas contemporaneous objection rule. That rule has now been modified by the Court of Criminal Appeals of Texas and Engle v. Isaac, presents no impediment to this Court's consideration of the constitutional error inherent in the state trial court's exclusion of prospective juror Marian Hall.

5. Erroneous Application of Henry v. Wainwright by the Court Below.

Bass argued before the court below that the court's consideration of his Adams and Witherspoon claims was not barred by State procedural default because the Court of Criminal Appeals of Texas did not strictly or regularly follow its own procedural requirement that unless a contemporaneous objection is made to the improper exclusion of a prospective juror under V.T.C.A. Penal Code, Section 12.31(b), any constitutional infirmity is waived. This contention was relegated to a footnote, 696 F.2d at pp. 1157-1158.

This on-again-off-again application of the contemporaneous objection requirement by the Court of Criminal Appeals of Texas, is apparent in the Bass case itself, where the responses of a a second prospective juror, claimed by Bass on direct appeal to have been improperly excluded, were discussed in detail, after which the Court concluded that she [Spensley] was properly excused under the standards set forth in Witherspoon. The Court noted in passing that since no objection was made to Spensley's exclusion, nothing was presented for review. Compare this with the Court's treatment of prospective juror Hall, who was obviously qualified. Bass v. State, 622 S.W.2d 101, 108-109(Tex.Cr.App.1981). The Court reached the merits of the Spensley issue while summarily disposing of Hall under the contemporaneous objection rule.

Bass narrowly averted execution, after a stay was denied by the United States District Court, was granted by a the Court of Appeals, and respondent's petition to dissolve the stay was denied by this Court. Months after Bass' scheduled execution the Court of Criminal Appeals of Texas modified its contemporaneous objection requirements

as applied to cases in which the voir dire had been conducted before Adams v. Texas, 448 U.S. 38 (1980) was decided, an apt and cogent argument against the present pressures to circumvent, short-circuit and curtail measured due process standards in capital murder convictions.

The rulings by the Court of Criminal Appeals of Texas in Ex parte Bravo, supra; Cuevas v. State, supra; and Hartfield v. State, supra; coupled with this Court's summary treatment of May v. Texas, supra, reflect a marked change in the state court's treatment of Adams error in cases decided after Boulware v. State, supra.

It is significant that in Hartfield the court specifically rejected the state's argument that the appellant had failed to preserve Adams error by making only a general objection to the veniremen's improper exclusion, even though the Texas court had long held that a general objection is equivalent to no objection at all. See Simpson v. State, supra; Russell v. State, supra.

All of the above factors rule out the extension by the panel below of the dictum from Henry v. Wainwright, 686 F.2d 311, 314, n. 4 (5th Cir. 1982). That court ignored a settled line of cases by this Court holding that "state procedural requirements which are not strictly or regularly followed cannot deprive [the federal courts]. . . of the right to review." Barr v. City of Columbia, 378 U.S. 146 (1964).

In addition to the cases cited in Barr, at 149-150, see e.g., Williams v. Georgia, 349 U.S. 375, 382-389 (1955); Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1946) (per curiam).

Henry does not consider this line of cases -- understandably, since the issue was neither focused nor decided in Henry -- but the Henry dictum is readily reconcilable with them, since Henry's language, read in the context of that case, deals with the situation where a state court uniformly and consistently applies its procedural rules to decline to entertain an entire class of claimed errors in all cases (see also Engle v. Isaac, 456 U.S. at 125, n. 27; 135, n. 44), not a situation in which a state court entertains identical claims in some cases that it holds forfeited in others. But to apply

the Henry dictum as the panel below did is to bring it into irreconcilable conflict with the repeated holdings of this Court that a state court's on-again-off-again application of state forfeiture rules cannot bar federal consideration of the merits of a constitutional claim which the state courts have declared forfeited in identical issues in other cases under a discretionary power to waive their rules. That is precisely the situation here (see Cuevas, Bravo, and Hartfield) as it was in Barr; and Barr is therefore controlling.

CONCLUSION

The state's contemporaneous objection rule cannot be used to circumvent the constitutional limitations imposed by this Court in Witherspoon and Adams.

Even if the state forfeiture rules can be used to circumvent a constitutional limitation imposed by this Court, they have no application here, in light of the subsequent holdings of the Court of Criminal Appeals of Texas in Bravo, Cuevas, and Hartfield, and the Texas court's interpretation of this Court's summary disposition of May v. Texas. It was apparent from trial counsel's voir dire that he was seeking to rehabilitate Ms. Hall from exclusion under Section 12.31(b). The futility of an objection to such exclusion was apparent to all Texas practitioners at the time Bass was tried, and has since been recognized by the Court of Criminal Appeals. Counsel's attempted rehabilitation of Ms. Hall was sufficient to trigger the Adams error, without the necessity of a meaningless objection.

If Bass is incorrect in this conclusion, and the Court entertains respondent's claim that Bass' failure to object to the exclusion of Ms. Hall constituted an "intentional bypass" of the state procedure for some tactical reason, despite the thrust of his rehabilitative questioning, that issue cannot be resolved without an evidentiary inquiry. Respondent's speculation is not supported by the record.

The extension of the dictum from Henry v. Wainwright, by the Court below, to exclude federal review of constitutional claims regardless

of how state procedural rules are used by the state court to nullify such claims, clearly conflicts with the holding of this Court in Barr v. City of Columbia, and cannot be utilized as a waiver of constitutional rights.

The exclusion of prospective juror Hall violated the rulings in Witherspoon and Adams. Her unconstitutional exclusion requires that the sentence of death assessed against Bass be vacated. Davis v. Georgia.

PRAYER

Charles William Bass prays that the sentence of death imposed upon him by the 177th Judicial District Court of Harris County, Texas, be vacated.

Respectfully submitted

Will Gray
TBA No. 08339000
Petitioner's lawyer
2038 Lexington Street
Houston, Texas 77098
(713) 759-0585

CERTIFICATION

I certify that I mailed two copies of this petition for writ of certiorari, certified mail, postage prepaid, to Ms. Leslie A. Benitez, Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on June 9, 1983.

Will Gray

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA 70130

GILBERT F. GANUCHEAU
CLERK

June 2, 1983

JUN 4 1983

Mr. Will Gray
Attorney at Law
2038 Lexington Street
Houston, TEXAS 77098

No. 82-2341 - BASS vs. ESTELLE

MANDATE STAYED TO AND INCLUDING JULY 2, 1983

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 21 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: Mary Lou Breaux
Deputy Clerk

Encls.

cc: Mr. Stanley Schneider
Mr. Stephen Pressor
Mr. Leslie A. Benitez

APPENDIX "A"

MDT-2

Charles William BASS,
Petitioner-Appellant,

v.

W.J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 82-2341.

United States Court of Appeals,
Fifth Circuit.

Feb. 4, 1983.

State prisoner appealed from a decision of the United States District Court for the Southern District of Texas, George E. Cire, J., denying his petition for habeas relief. The Court of Appeals, Gee, Circuit Judge, held that: (1) issue whether trial court properly dismissed venireman was waived; (2) trial court did not abuse its discretion in refusing to discharge juror who sought release from jury service; (3) trial court did not deny state prisoner effective assistance of counsel by refusing his request, made two days prior to trial, to dismiss his court-appointed counsel; (4) state prisoner would not be allowed to present for the first time on appeal from denial of his federal habeas petition claims that predecessor appellate counsel were ineffective in failing to properly present to state courts, and so to exhaust, all possible claims of trial counsel's ineffectiveness; and (5) remand would be ordered for hearing on state prisoner's claims that trial counsel was ineffective, but only as to those claims that had been exhausted in state courts and advanced in the district court and on which no hearing had ever been held.

Order accordingly.

Goldberg, Circuit Judge, filed specially concurring opinion.

1. Habeas Corpus ⇐25.1(1)

A state prisoner, barred by procedural default from raising a constitutional claim on direct appeal, cannot do so in a federal habeas proceeding without demonstrating both cause for the default and actual prejudice resulting from it.

2. Criminal Law ⇐1035(5)

Under Texas law, a contemporaneous objection to the exclusion of a venireman is required on pain of waiver of the point on appeal.

3. Criminal Law ⇐1134(8)

Standard of review for capital cases is the same as for noncapital cases.

4. Habeas Corpus ⇐25.1(1)

Any prisoner bringing a constitutional claim to the federal court after a state procedural default must demonstrate cause and actual prejudice before obtaining habeas corpus relief.

5. Criminal Law ⇐1035(5)

State prisoner's failure to object to dismissal of venireman at trial could not be excused on grounds that at the time the state court system of Texas failed to properly understand and apply *Witherspoon*.

6. Habeas Corpus ⇐25.1(4)

Issue whether trial court properly dismissed venireman was waived for federal habeas purposes, where state prisoner failed to make a contemporaneous objection at trial as required under Texas law.

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7. Criminal Law ⇐1152(2)

The trial court's refusal to discharge a juror is reviewed for abuse of discretion only.

8. Criminal Law ⇐1144.8

Trial court's refusal to discharge a juror is endowed on appeal with a presumption of correctness.

9. Jury ⇐149

Trial court did not abuse its discretion in refusing to discharge juror who sought release from jury service in a capital case after she awakened to find a knife-bearing intruder in her bedroom.

10. Criminal Law ⇐641.12(1)

Trial court did not deny state prisoner effective assistance of counsel by refusing his request, made two days prior to trial, to dismiss his court-appointed counsel and for a continuance to permit his representation by new counsel who knew nothing about the case and were just commencing a lengthy trial in another state.

11. Habeas Corpus ⇐113(5½)

State prisoner would not be allowed to present for the first time on appeal from denial of his federal habeas petition claims that predecessor appellate counsel were ineffective in failing to properly present to state courts, and so to exhaust, all possible claims of trial counsel's ineffectiveness.

12. Habeas Corpus ⇐113(13)

Remand would be ordered for hearing on state prisoner's federal habeas claims that trial counsel was ineffective, but only as to those claims that had been exhausted in state courts and advanced in the district court and on which no hearing had ever been held.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, GEE and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:

In 1979 Appellant Bass murdered a uniformed police officer who, having caught Bass red-handed with loot from a bar robbery that he had just committed, was attempting to apprehend him. His state conviction and death sentence were confirmed on direct appeal. *Bass v. State*, 622 S.W.2d 101 (Tex.Cr.App.1981), *cert. denied* —— U.S. ——, 102 S.Ct. 2040, 72 L.Ed.2d 491 (1982). Bass then exhausted state habeas remedies as to the points presented here, his application for the writ being dismissed without hearing. His petition to the court below suffered the same fate, and he appeals to us asserting several points.

Witherspoon and Waiver

Bass asserts that one member of the venire, Mrs. Marian Hall, was improperly excused under the dictates of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Such determinations are often difficult ones, and that as to Mrs. Hall falls in this category. Her testimony paints the picture of an educated, intelligent woman of strong character, anxious to perform her civic duty of jury service but harboring deeply-seated scruples against the death penalty. Even so, she stated at one point that she believed she could follow the law and at another that she could assess the penalty "if there's no other way to make sure they are not back on the streets." In

the end, however, she stated that she would be unable to take the required oath that the mandatory penalty of death occasioned by affirmative answers to a triad of questions required by Texas law would not affect her deliberations on any issue of fact. After she had so said, the court sustained a challenge for cause.

Were we required to reach a final conclusion, we might incline to the view that her dismissal was improper. Since, however, we do not wish to add further precedent to the burgeoning common law of *Witherspoon* and since we conclude we are not required to do so, we shall assume, without deciding, that it was. But since we also conclude that Bass's admitted failure to object to her dismissal waived the point, a decision of the *Witherspoon* issue is unnecessary to disposition of his appeal.

[1, 2] It is settled law that such a state prisoner as Bass, barred by procedural default from raising a constitutional claim on direct appeal, cannot do so in a federal habeas proceeding without demonstrating both cause for the default and actual prejudice resulting from it. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Texas procedure requires a contemporaneous objection to the exclusion of a venireman on pain of waiver of the point. *Boulware v. State*, 542 S.W.2d 677 (Tex.Cr.App.1976), *cert. denied*, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977). None was made by Bass to the dismissal of Mrs. Hall from the venire. On these facts, the state contends that whether or not Mrs. Hall was properly excused is not before the court, the point having been waived.

[3] Bass advances several arguments to the contrary. The first of these, serving as a sort of preparatory artillery barrage for his more specific attacks and reiterated at various points throughout his general presentation, consists of variations on the "death is different" theme. Citing several expressions of the Supreme Court and others emphasizing the seriousness with which capital cases are to be regarded and reviewed,[1] Bass suggests that there are what amount to two procedural systems for review of criminal cases: one for those in which capital sentences have been imposed, another for the rest. Implicit throughout his arguments, the suggestion becomes explicit in his treatment of *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), discussed below. Since the suggestion is merely general and implicit, we treat it in the margin.[2]

1. Such, for example, as Justice Stevens' often-quoted expression in concurrence: "Because of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review." *Coleman v. Balkcom*, 451 U.S. 949, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981).

2. In general response to the implicit suggestion, we note our disagreement with it. The various expressions of the Supreme Court quoted by Bass are not more than precatory ones, expressive of the sanctity with which all decent men view human life as endowed and the gravity with which they regard a decision—however measured it may be—to terminate it. Nor are these expressions novel or the sentiments which they avow newly-arisen; they go back to the Black Cap and beyond, stretching far into times when human life was shorter, more perilous, and less highly regarded than it is today. To be sure, they also refer to the many explicit safeguards that have now been enacted or deduced to express these concerns. But to suggest that a different general mode of review is required by them is to demean the criminal law generally, to imply that we might somehow view lightly such questions as whether a life sentence or one for a lengthy term of years was arrived at properly. There is one system of criminal appellate review, applicable to all cases and to this one.

[4] In *Engle v. Isaac*, supra, the Supreme Court considered whether a colorable constitutional claim—that due process requires proof of a negative, the absence of self defense, when that defense negates an element of the crime charged—was preserved for review where the requisite contemporaneous objection was not made. Citing the costs to society and to our federal system of permitting such disregard of state procedures and safeguards, the Court declined to make an exception for any constitutional claim whatever to the rule of *Wainwright v. Sykes*, supra.[3] The breadth of the Court's language—"a constitutional claim"—renders unnecessary an analysis by us of petitioner's arguments that *Witherspoon* contentions cannot, per se, be waived. We are bound to follow the law of the Court; if exceptions are to be made to rules stated in such terms by the Court, it is for the Court to make them, not for us.

[5] *Sykes* and *Engle*, however, recognize that waiver can be avoided by a showing of "cause" and "prejudice;" and Bass argues that "cause" existed in his case. This is said to be so because at the time of his trial the state court system of Texas failed properly to understand and apply *Witherspoon* and hence any objection would have been meaningless. A very similar suggestion was, however, squarely rejected in *Engle. Witherspoon v. Illinois*, decided in 1968, long antedated petitioner's trial in 1980, so that the basis of the contentions successfully made in *Adams v. Texas*, 448 U.S. 38, 39, 100 S.Ct. 2521, 2523, 65 L.Ed.2d 581 (1980)—the same contentions that counsel alludes to here—was apparent and available. Petitioner's contention to us therefore goes down before the specific language of *Engle*:

> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.

— U.S. at —, 102 S.Ct. at 1574, 71 L.Ed.2d at 804.

[6] We hold that petitioner's *Witherspoon* objection to the discharge of Mrs. Hall was waived.[4] An objection to the dis-

3. The Court's language, written in response to a contention that where the constitutional error asserted might have affected the truthfinding function an exception to the *Sykes* waiver should be made, could scarcely be more sweeping:

> We do not believe, however, that the principles of *Sykes* lend themselves to this limitation. The costs outlined above do not depend upon the type of claim raised by the prisoner. While the nature of a constitutional claim may affect the calculation of cause and actual prejudice, it does not alter the need to make that threshold showing. We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.

Engle v. Isaac, — U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 801.

4. Bass also appears to contend that since on occasion the Texas court addresses the merits of claims which it might have viewed as waived, and that when it does so we consider ourselves authorized to do likewise, *e.g., Burns v. Estelle*, 592 F.2d 1297 (5th Cir.1979), *aff'd en banc* 626 F.2d 396 (1980), we must disregard the state's contemporaneous objection rule in all cases. We have recently rejected this contention. Speaking of our practice of reaching the merits where the state court has done so, rather than resting on procedural default, we explained:

> Otherwise, federal habeas review would unjustly be denied a prisoner who has no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity

charge of a veniremen is little to require; to hold otherwise would open the discharge of every veniremen, objected to or not, in such cases as this—where the venire examination consumed over two-thirds of the 3000-page record—to examination on appeal. We cannot countenance such ambushing of state processes.

The Refusal to Discharge Juror Turner

About a month after being selected as the fourth juror, and before trial commenced, Juror Marilyn Turner awakened to find a knife-bearing intruder in her bedroom. Shaken by this experience, she approached the court, seeking to be excused from jury service because of doubts about her impartiality, distraction resulting from her fright, and inability to concentrate.[5] At a hearing held by the court she testified to her agitated state, extending even to physical symptoms such as nausea and sleeplessness. She also testified, however, that she was willing to do her civic duty and that she would do her best to follow the court's instructions on the law. Bass refused to consent to her release unless he was granted additional peremptory challenges, his having been exhausted. The trial court declined to do so or to discharge her, and the Texas Court of Criminal Appeals agreed. 622 S.W.2d at 104–107. Before us, Bass claims that these determinations violated his constitutional rights to due process and an impartial jury.

[7–9] We reject these contentions. The trial court concluded that Ms. Turner was neither disabled nor biased against Bass. Both in the Texas system and in ours, such determinations, even on direct appeal, are reviewed for abuse of discretion only. *Bass v. State*, 622 S.W.2d 101, 106–7 (Tex.Cr.App.1981); *United States v. Horton*, 646 F.2d 181, 188 (5th Cir.1981). Before us, such determinations by state tribunals are, in the absence of exceptions not asserted here, endowed with a presumption of correctness. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The trial court both heard and saw the manner of Ms. Turner's testimony. We discern no abuse of its discretion.[6]

Refusal of Continuance for New Counsel

[10] Two days before trial, Bass sought permission of the court to dismiss his court-appointed counsel and for a continuance to permit his representation by new counsel

considerations underlying *Sykes* and *Isaac*, for all a state must do to preclude federal examination of an alleged error contrary to state procedural rules is to indicate that it has found the claim to be procedurally barred.

The appellant asserts that we have circumvented *Sykes* and *Isaac* by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest the mere excuse of a default in another case allows a federal court to excuse a default in a case where the state courts have not. Instead, we have looked to Florida law to determine what the state courts have done in the case before us. This is a necessary accepted analysis in habeas cases. *See, e.g., County Court v. Allen*, 442 U.S. 140, 149–51, 99 S.Ct. 2213, 2220–22, 60 L.Ed.2d 777 (1979).

Henry v. Wainwright, 686 F.2d 311, 314 n. 4 (5th Cir.1982).

5. She testified that the intruder was not Bass and had been apprehended.

6. Ms. Turner's situation is a far cry from that of Juror Sevely in *United States v. Taylor*, 554 F.2d 200 (5th Cir.1977), an opinion on direct appeal cited to us by Bass. There the trial judge failed to disclose to defense counsel her stated fear for her life resulting from living in the same location as defendants, having been a past victim of them, etc.

from Alabama, counsel who knew nothing of the case and were just commencing a lengthy trial in Georgia. Bass's case had been set for trial for two months. His stated ground was a sudden loss of personal confidence in his appointed counsel and a desire for new ones specializing in "death cases." After hearing argument, the court refused these requests. Bass asserts that by so doing the court denied him effective assistance of counsel. We disagree, finding a complete answer to the contention in the language and authorities cited in *United States v. Silva*, 611 F.2d 78 (5th Cir.1980):

> On the day before trial defendant made an oral motion for continuance, informing the district court he wished to substitute retained counsel for court-appointed counsel. Denial of defendant's motion did not deny defendant his Sixth Amendment right to counsel since there is no absolute and unqualified right to counsel of choice, even where counsel is retained. *United States v. Brown*, 591 F.2d 307, 310 (5th Cir.), *cert. denied*, 442 U.S. 913, 99 S.Ct. 2831, 61 L.Ed.2d 280 (1979). The freedom to have counsel of one's own choosing may not be used for purposes of delay. *United States v. Uptain*, 531 F.2d 1281, 1290 (5th Cir.1976). Last minute requests are disfavored. *United States v. Sexton*, 473 F.2d 512 (5th Cir.1973). Denial of a continuance is within the discretion of the trial judge and will not be reversed absent a clear abuse of discretion. *United States v. Harbin*, 601 F.2d 773, 778 (5th Cir.), *cert. denied*, [444] U.S. [954] 100 S.Ct. 433, 62 L.Ed.2d 327 (1979). There was no abuse of discretion here.

Nor was there any here.

The Motion to Dismiss without Prejudice

Rightly or wrongly, at present the review of cases in which capital sentences have been imposed customarily incorporates three full-dress proceedings: (1) direct appeal, with resort to the Supreme Court in the event of an affirmance; (2) habeas corpus proceedings through the state system, pursued both with a view to obtaining relief and the requisite exhaustion as well, with like attempted resort to the Supreme Court; and (3) statutory habeas proceedings through our hierarchy of federal courts. Understandably, most convicted defendants sentenced to death covet delay, if nothing better can be had; and the nine to eleven court proceedings permissible according to present arrangements provide it in generous measure—it is now well over three years since Bass murdered Officer Baker and we are only at the next-to-last stage of the third general proceeding.

Among the claims before us, one discussed below is that trial counsel was ineffective. Substituted appellate counsel now suggest that their predecessor *appellate* counsel was ineffective as well, ineffective in failing properly to present to the state courts (and so exhaust) all possible claims of *trial* counsel's ineffectiveness. So suggesting, Bass moves us to cause the present federal proceedings to be dismissed at their penultimate stage so that he may once more commence the second general stage of the proceedings. In support of his motion, he advances to us new claims for relief not presented to the state courts or our lower federal court, appends ex parte exhibits, advances hearsay declarations that a confession given by Bass (but not introduced at the trial) was coerced, and so on. Thus entire and novel vistas of delay come in prospect, delays to be added to those already noted.

[11] It will not do. Much is due Bass, standing as he does under sentence of

death, but something is due as well to justice and the judicial system, one that stands between us and anarchy and self defense. We decline to permit Bass to tie both concerns in knots by such last-minute maneuvers, maneuvers that would, if countenanced, entail commencing again and from the outset the entire panoply of state and federal habeas proceedings, perhaps only to face new contentions at some later stage in them that *present* appellate counsel failed in their obligations to him in some manner. Somewhere, even in a capital case, there must be an end—especially, perhaps, in one such as this, where there can be no doubt of Bass's guilt. Since these contentions were not presented to the trial court, but only to us and for the first time on appeal, in accordance with our long-established precedent we decline to reach them. *Spivey v. Zant*, 661 F.2d 464 (5th Cir.1981) and authorities cited at 477. We deny the motion.

Ineffective Assistance of Counsel?

We have declined to reach claims that were not presented to the state courts or to the court below. Certain claims that trial counsel was ineffective were exhausted in state courts and advanced in the court below, however, and therefore require our attention. These are, as presented, trial counsel's claimed ineffectiveness stemming from:

(1) Counsel's failure to investigate the offense in question;

(2) Counsel's failure to challenge, legal proffer, the initial stop, search and subsequent arrest of the defendant;

(3) Counsel's failure to challenge the identification procedure of said defendant, legal proffer, and to show that said proceeding was tainted by an illegal confession herein and;

(4) Counsel's failure to exercise the fundamental right of cross-examination in regards to *Witherspoon* jurors.

In addition to these, Bass presented and exhausted the claim that counsel was ineffective for failing to object to the dismissal of Mrs. Hall, the matter discussed above in the initial division of our opinion.

[12] No hearing has ever been held in any court on these exhausted claims. Though some are sufficiently vague that it is difficult to view them as factual allegations, one at least—that regarding the failure to object to the discharge of Mrs. Hall from the venire—is clear and factual. Whether that failure may have resulted from a tactical decision or other justifiable circumstance cannot be determined from this record, and the court below made no factual findings in support of its order of dismissal. We remand the cause to the district court for a hearing on these exhausted claims. No others need be considered. In all other respects the decision below is affirmed. It is so

ORDERED.

GOLDBERG, Circuit Judge, specially concurring:

I concur in the result in this case, but write with a regretful pen because I do not embrace the apologia juxtaposed to the remanding words. I cannot and do not endorse the concept suggested by the majority in its footnote two that no difference exists between a case in which a man's life is at issue and a case in which a fifty dollar fine is the maximum sanction. To the contrary, I submit that capital cases demand special consideration, both at trial and on appellate review, because of the exceptional and irrevocable nature of the penalty involved.

In pronouncing the ultimate sentence, our enunciation must be positive, definite, unconditional, and without prefix, for once the words are pronounced there is no suffix. Surely, when a life hangs in the balance, extraordinary care and rigorous scrutiny are not too much to ask.

I wholeheartedly agree with Judge Gee's assessment that this cause must be remanded to the district court. Although judges' lights emanate at times from different judicial spectra, in this instance they focus upon the necessity for a plenary hearing on Bass's exhausted claims of ineffective assistance of trial counsel. As the Supreme Court observed in *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963), unconstitutional detention is so insupportable that "the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." In *Townsend* the Court emphasized the plenary nature of the federal courts' power of inquiry in habeas cases, substantially increasing the availability of evidentiary hearings in such proceedings. Outlining the situations in which hearings would be required, the Court made mandatory much that previously had been discretionary with the district courts. *See Smith v. Yeager*, 393 U.S. 122, 125, 89 S.Ct. 277, 279, 21 L.Ed.2d 246 (1968). The Court decreed:

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Townsend, 372 U.S. at 312–13, 83 S.Ct. at 756–57 (footnote omitted).

No court, state or federal, has ever held a hearing to ventilate Bass's claims that his legal assistance at trial was ineffective. *Townsend* requires the federal court to address the merits of these factual claims in a full and fair evidentiary hearing. Undeniably, a remand for such a hearing is the appropriate resolution of this matter, and with this resolution I concur.

Perhaps in underscoring the necessity for granting a hearing in Bass's case I belabor the point. I do so, however, because I fear that the ultimate result in this case—a remand for an evidentiary hearing—is overshadowed by other language in the majority opinion. I do not wish to see a habeas applicant's right to an evidentiary hearing denigrated by the apologetic fashion in which the majority grants a remand.

My concern for Bass's right to a hearing is magnified by the overriding fact that this is a death penalty case. As the Supreme Court has recognized and reiterated, "there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980). "[D]eath is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303–04, 96 S.Ct. 2978, 2990–91, 49 L.Ed.2d 944 (1976). *See Furman v. Georgia*, 408 U.S. 238, 286–91, 92 S.Ct. 2726, 2750–53, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring); *id.* at 306, 92 S.Ct. at 2760 (Stewart, J., concurring). Because "death as a punishment is unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976), the Supreme Court has been especially sensitive to ensure that every possible safeguard is observed in capital cases. *Id.* Death cases truly and deserved-

ly are in a class by themselves, see *Furman*, 408 U.S. at 287-88 & n. 34, 92 S.Ct. at 2751 & n. 34 (Brennan, J., concurring), for death has a uniqueness that no philosopher's stone has ever transmuted, no mill stone has ever crushed.

I view these pronunciamento as more homiletical than precatory. To me, the teachings of the Supreme Court admonish that fastidious trial procedures and meticulous scrutiny on posttrial review are mandated before the death penalty may be imposed. We do not demean the criminal law by suggesting a different treatment for capital cases: rather, we elevate life over death.

The majority opinion implies that the procedures, the penology, and the attitudes of the decisionmaker should be the same, whether the defendant is charged with speeding or subject to a capital offense. But all cases are *not* alike. The law is replete with discrepant standards for the application of many of its maxims and apothegms. For example, the proper scope of appellate review depends upon whether the factfinder was judge or jury; a recidivist may be punished more harshly for a particular crime than a first-time offender. These too are "double standards" in the law, but they shock neither the conscience nor the intelligence.

When the criminal justice system exacts the ultimate penalty, and an individual is executed, no constitutional wrong can ever be rectified. The penalty is irrevocable and inexorable. Therefore we must be certain, and I would underscore *deadly certain*, that no germ of constitutional error has infected the prosecutorial treatment. Two things must be indisputable: that the accused is in fact guilty, and that no facts or factors militate against putting the accused to death. There are no writs of habeas corpus from a casket.

That capital cases create an extraordinary situation for the accused, the decisionmaker, and the appellate judges on review cannot fairly be denied. Such an extraordinary situation demands extraordinary treatment: exacting procedural protections at trial and close scrutiny on appellate review. I am even emboldened to suggest that the standard for effectiveness of trial counsel defending an accused on a capital charge should be elevated, in order to ensure that the fundamental constitutional rights of an accused are asserted and protected. *See Wainwright v. Sykes*, 433 U.S. 72, 118, 97 S.Ct. 2497, 2522, 53 L.Ed.2d 594 (1977). (Brennan, J., dissenting) (suggesting that limitations on scope of habeas jurisdiction may force reconsideration of standards for adequacy of counsel). Only the most unyielding criteria for representation and review can guarantee that the death penalty is imposed only where appropriate.[1]

In recent years, postconviction relief from unconstitutional detentions has been hedged about by a plethora of statutory and judicial procedural barriers that have obstructed the view of habeas corpus afforded by *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). The majority opinion highlights the most perilous of these obsta-

1. The majority states that in this case "there can be no doubt of Bass's guilt," *ante* slip op. at 2312, at ——, suggesting somewhat obliquely that the certainty with which an appellate court views the determination of an accused's guilt should affect the resolution of the accused's collateral claims. This rationale conflates the issues of culpability and constitutionality. To resolve that an accused is guilty is one thing; to declare that he has constitutionally been sentenced to die is quite another.

cles—the contemporaneous objection rule and the "cause and prejudice" standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Judge Gee intimates strongly that if he were a free agent he would hold that venireman Hall should not have been excused. Yet, as he conclusively convinces me, Supreme Court treatment of the contemporaneous objection rule forecloses our consideration of this constitutional claim. In response, I can only say that while I agree with Judge Gee's interpretation of the law enunciated by my superiors, I find it profoundly regrettable. Only the sweeping synoptic language of the majority opinion in *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1983), compels me to concur with the majority's analysis. *Engle* is the law, and Judge Gee has read it according to the King's English, but its holding is myopic and not subject to my approbation. It saddens me to admit that there is rarely any escape from the executioner's activities under the let us Hope raised upon the Great Writ, which seems to become less great as the years pass. Were I musician rather than judge, I would compose a dirge; instead, I sorrowfully file this special concurrence. I am not ready to put *Fay v. Noia* in the hangman's noose; I pray that, for all its recent modifications and exceptions, it shall never die.

To justify its refusal to address certain of Bass's claims, the majority invokes the importance of finality in criminal cases. There is a natural collision of consciences in rendering justice when a human life has been taken by the individual who must approach the gallows. I share the majority's respect for finality, for concluding the lengthy process of criminal appeals. Even those incarcerated on death row, those who live beneath the sword of Damocles, must in some ways long for a sense of closure. Yes, there must be an end to criminal litigation. Our duty as judges, a duty we may not shirk, is to ensure that the ending is a *constitutional* one. Some things go beyond time.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Charles William BASS,
Petitioner-Appellant,

v.

W.J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 82-2341.

United States Court of Appeals,
Fifth Circuit.

May 19, 1983.

Texas prisoner sought habeas corpus. The United States District Court for the Southern District of Texas, George E. Cire, J., denied relief. The Court of Appeals, 696 F.2d 1154, affirmed in part and remanded in part. On petition for rehearing, the Court of Appeals, Gee, Circuit Judge, held that Texas contemporaneous objection rule requires some expression of dissent from dismissal of a juror before it may be complained of on appeal and that occasional act of grace does not constitute such a failure to strictly or regularly follow the contemporaneous objection rule as to permit its disregard generally.

Rehearing denied.

1. Criminal Law ⇐1035(5)

Texas contemporaneous objection rule, while excusing generality of an objection in case of constitutional issues of jury selection, nonetheless require some expression of dissent, however vague, from dismissal of a juror before it may be complained of on appeal.

2. Habeas Corpus ⇐25.1(1)

Occasional act of grace by Texas courts in entertaining merits of claim that might be viewed as waived by procedural default does not constitute such a failure to strictly or regularly follow the state's contemporaneous objection rule as to permit federal habeas court to disregard the rule generally, or where the state court has not done so in the specific case.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

(Opinion February 4, 1983, 5 Cir., 1983, 696 F.2d 1154)

Before GOLDBERG, GEE and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:

[1] In his motion for rehearing, Bass contends that three Texas decisions handed down since submission of this appeal abolish the state's contemporaneous objection rule as to jurors wrongfully excluded under the provisions of state law, Vernon's Texas Penal Code Section 12.31(b), prior to the Supreme Court's decision in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and that, in any event, since that rule is not strictly and regularly applied we should disregard it. The decisions relied on by Bass do not go so far as he would like. Examination of them makes plain that their rule is a narrower one: that such a mere general objection or exception to the dismissal of a juror as would normally be deemed under Texas law to present nothing for review will be deemed sufficient in instances occurring before the handing down of *Adams*, not that no objec-

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tion whatever is required. In each of the three decisions an objection of some sort was made, and in each the rule as stated was applied.[1] It is true that in the *Cuevas* opinion, note 1, the Texas court observed, in dicta, that in certain circumstances an entire failure to object on grounds rising to constitutional magnitude does not constitute waiver. This observation appears just before the passage from *Cuevas* quoted at note 1, however, and seems to apply only to situations where the grounds in question were novel and unknown. Such cannot have been the case here, where Bass was tried in the spring of 1980 and the precise grounds of objection—overbreadth of Section 12.31(b) under the *Witherspoon* test—had already been upheld by this court a year earlier. *Burns v. Estelle*, 592 F.2d 1297 (5th Cir.1979), *aff'd en banc*, 626 F.2d 396 (1980). We therefore conclude that the Texas rule, while excusing the generality of an objection in such circumstances as these, requires *some* expression of dissent, however vague, from the dismissal of a juror before it may be complained of on appeal.

[2] As for the second contention, we do not regard an occasional act of grace by the Texas court in entertaining the merits of a claim that might have been viewed as waived by procedural default to constitute such a failure to strictly or regularly follow the state's contemporaneous objection rule as permits us to disregard that rule generally, or where the state court has not done so. The basis of this claim is *Barr v. Columbia*, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964), a civil rights case in which the Court refused to accept the generality of exceptions as an independent and adequate state ground barring constitutional review, where the Court was able to point to four separate decisions from the same state court, all handed down within weeks of that before it for review, deeming identical exceptions sufficient. Such selective constructions of identical language are a far cry from our case. Moreover, we do not regard as dicta the language quoted by us in our original opinion from *Henry v. Wainwright*, 686 F.2d 311, 314 n. 4 (1982), and since it is not, we are bound by it. Instead, it is a holding, voiced in response to a party's contention, that we will not excuse a procedural default in a case where state courts have not done so. Until such contructional legerdemain as occurred in *Barr* is drawn before us, we see no occasion to re-examine that holding; and no such thing is apparent here.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

DENIED.

1. In *Cuevas v. State*, 641 S.W.2d 538, 563 (Tex.Cr.App.1982), the opinion states:

> An examination of the voir dire shows that the State, appellant, and the trial court were fully aware of *Witherspoon* issues. Appellant made a sustained and vigorous effort to keep Ward from being excluded. Appellant objected to the successful exclusion of Ward on the grounds that, inter alia, "it would deprive this Defendant of a jury comprised of a fair cross section of the citizens of this community, and we submit further that he's qualified by his answers." The error was preserved.

And in *Ex parte Bravo*, — S.W.2d — (Tex.Cr.App. Dec. 15, 1982) (general objection) and *Hartfield v. State*, 645 S.W.2d 438 (Tex.Cr.App.1980) (exception to ruling), the same rule was applied.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 82-2341

D. C. Docket No. CA H 82 2337

CHARLES WILLIAM BASS,

Petitioner-Appellant,

versus

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, GEE and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

FEBRUARY 4, 1983

ISSUED AS MANDATE:

OP-JDT-9
Rev. 6/82

MR. BLAINE: Pass the witness.

THE COURT: What says the State as to Mr. Miller?

MR. GRAHAM: We will take Mr. Miller, Your Honor.

THE COURT: What says the Defense as to Mr. Miller?

MR. BLAINE: We will excuse him, Your Honor.

THE COURT: Mr. Miller, if you will see the Clerk on the other side of the bench, he will place you in line for pay.

MARIAN HALL

EXAMINATION BY THE COURT

Questions by the Court:

Q You are Mrs. Marian Hall?

A Right.

Q Is this address, Mrs. Hall, 7831 Bateman, an address in Harris County?

A Yes, it is.

Q Mrs. Hall, as I explained to you, we are in the process of selecting a jury in the case of the State of Texas vs. Charles William Bass, who is seated here with his Attorney, Mr. Victor Blaine, and the State's Attorney is Mr. Bert Graham representing the Prosecution. Mr. John Holleman

APPENDIX
"B"

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is not in the Court at this time. Do you know any of those people, Mrs. Hall?

A No, I don't.

Q Do you know or think you know something about the facts?

A No, I don't.

Q That are underlying this case?

A No.

Q Do you know of any reason why you couldn't serve as a fair, impartial juror, were you to be selected?

A No, I don't.

Q You understand that the range of punishment is very narrow. It's either life or death, if the jury found the Defendant to be guilty of this offense. Do you have any objections, conscientious objections to the infliction of death as a punishment for crime in a proper case?

A No, I guess not.

Q You understand the legislature has told us how we go about determining what a proper case is?

A Yes.

Q That is, first, the Defendant must be found guilty of those enumerated offenses that they have stated are capital murder offenses.

A Yes.

Q This is one of those enumerated. Then the jury would come back into Court and hear additional evidence and be

charged again on the punishment part of the trial to answer these special issues and then it's how they answer the special issues that guides the Court and directs the Court as to what punishment is to be assessed. If you answer each of the questions yes, then the Court must assess the death penalty. If you answer any of them no, then the Court must assess life. That's the way the legislature has given us as the mechanics as to how to go about determining the punishment. Of couse, you don't know what the questions are, do you?

A No.

Q Well, the questions, upon a finding of guilt and additional evidence that both sides may offer, would be whether the conduct on the part of the Defendant was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. And you could answer that question either yes or no based on the evidence again, which you had heard in the trial.

Now, the second question would be sent to the jury to deliberate upon, whether there is a probability that the Defendant would commit criminal acts of violence that would be a continuing threat to society. The State has the burden of proof, so they must prove, for the Court to assess the penalty, that you should answer both those questions yes. There is a possibility of a third

question that I won't get into at this time. But do you feel if you had the evidence of guilt beyond a reasonable doubt for the offense you have found him guilty of, you have the evidence that convinced you of guilt beyond a reasonable doubt -- I mean, on the second part, if you felt beyond a reasonable doubt the State had proven you should answer yes to those questions, could you answer yes knowing the Court would then assess the death penalty?

A I guess so.

Q The lawyers are not going to be satisfied with "I guess and I think so". You realize this is the most serious criminal offense. I'm sure it's not something that you had an opportunity to participate in. But the lawyers are going to want to have a more definite view of your feelings regarding the law.

Now, you are not obligated to agree with any of these laws. That's a citizen's right to differ with any of them. But the lawyers must know how you feel about it, because they feel that there's going to be testimony and evidence bearing upon these issues, if the testimony and evidence is presented the way they feel it's going to be, so they will be relevant to your conduct as a potential juror. And if you are sworn in as a juror, you will be expected to follow the laws we are discussing. So they need to have a little more definite answer

than "I guess so or I think so or maybe", because they are important matters to both sides of the lawsuit. So if you will just try to give it your best shot and your best considered opinion, if you don't understand their questions, well, then ask them to restate it, because it's not -- even the language is something that most people are not too familiar with, and they will be glad to restate it if it's necessary.

Mr. Graham will have some additional questions.

EXAMINATION BY THE STATE

Questions by Mr. Graham:

Q Mrs. Hall, the purpose of this part of the trial is just to find out what you really think about some laws in our State. Those laws are criminal laws, are laws that control the criminal trials in our State. They are laws that are passed by the legislature, like all our other laws are passed by the legislature. There are certain laws on the books that everybody doesn't agree with. Do you agree with that?

A Yes.

Q So some of these laws we will be talking about today you might not agree wtih or you might. We are trying to find out whether you do or not. Basically, it doesn't matter whether you disagree with some of the laws. There are no right or wrong answers in this part of the trial.

Everybody feels differently about certain situations, so we are trying to find out how you feel. You are not less of a citizen if you happen to not agree with some law the legislature passed in 1974. That's what we are working with here. This law was passed in 1974. At least fifty-one percent of the legislators were for it. I guess maybe forty-nine percent of them were against it, I don't know. But if you happen to be a person that's against some of these laws, now is the time to tell us, is the point I'm trying to make, because in this part of the trial you have been sworn to tell us the truth about how you feel about these laws basically.

On the other hand, if you were put on the jury -- see, you are not on the jury yet -- but if you were put on the jury, then you have to take a new oath, a different oath, and swear that you would follow the law whether you agreed with it or not. So this part of the trial is to find out whether you disagree with some law to the point you could not conscientiously follow that law on the jury, and a lot of people feel that way about the death penalty. For instance, they feel like "Well, I couldn't follow that law because I don't agree with it", or "I agree with it, but I couldn't be the one to actually do it, to the point I couldn't follow the law". If that's the way you feel, for instance, that would be okay. Nothing is wrong

with that. It's one of the few times a citizen can walk into a courtroom, get on the witness stand and turn around and tell the Judge "Your Honor, I don't agree with that law, my conscience won't allow me to follow it, I won't follow it", and nothing will happen to you. The Judge will just thank you for being honest and we will continue with somebody else. It's not a test. There aren't any certain ways you are supposed to answer these questions.

Another purpose that I have, at least at this point, is to try to get you to understand what we are really here about, to try to convey the seriousness of the situation to you, because you are just really that close to getting on the jury that will decide whether a person really lives or dies. That's what this is all about. That's a very heavy responsibility. It may not be one that you thought you would be faced with when you came down to jury service today, so I would like, if I can, to try to get you to put yourself in the position while I'm asking you these questions, to try to put yourself in the position if you were on the jury and in two or three weeks you are back in the jury room trying to decide how to answer these questions the Judge has been talking to you about. Would you really be able to do it according to the law in that situation, or would you feel like "Well, the law says I'm supposed to answer these

questions this way because the State proved it to me, but, still, my conscience wouldn't allow me to do that. This is too much of a responsibility. It's too much to ask of me to do, because I don't agree with that law".

A You want me to answer both those questions? Is that two questions? One of them was could I --

Q Well, basically, I'm trying to find out, first of all, do you agree with the death penalty or not?

A I can't say. I don't think -- I have to either say yes or no?

Q Yes.

A No. But, on the other hand, I do think I could carry out the law. If that is the law, if I were on the jury, I would carry it out.

Q Well, see, the law is set up to where -- the legislature set up this part of the trial to find out the people who don't agree with the death penalty, because the legislature at least doesn't feel that people who don't agree with it should be forced to go on and do something like that; if their conscience wouldn't allow them to do that, they shouldn't be put in the dilemma of having to take an oath to do something their conscience wouldn't allow them to do. Well, have you thought about the death penalty question much before today? I mean, have you talked about it in the past or thought about it as to

whether or not you agree with the death penalty?

A Well, when they brought the death penalty by injection -- is that the 1974 law?

Q No, that was like a year ago.

A I thought about it.

Q What did you think about that, if I might ask?

A I thought I would rather they were just sentenced to life in prison than to put someone to death.

Q Then do you feel that there's no good purpose served by putting someone to death as opposed to life imprisonment?

A Yes, if there's any chance at all, but --

Q Any chance at all of what?

A That they are not guilty.

Q Of course, with this I'm assuming you would be -- if you were on a jury, before you would ever get to the question of whether a person gets the death penalty or not, you have to decide whether or not he's guilty and we are assuming for the moment you found somebody guilty of committing this murder that called for possible death penalty. If you did find somebody guilty of capital murder, then you would have a choice of giving them life imprisonment or death.

A If you give them life imprisonment, will they have parole sometime?

Q Did you say would they have parole?

A Yes.
Q That's a possibility, yes. You would be instructed that you would not be able to consider whether or not someone would be able to get out on parole or not. But we do not have a law that says you have life without parole. We don't have that in this State.
A That would be my favorite law.
Q See, we don't have that law. So that leaves us with either a life sentence or death penalty. Those would be the only two choices if you found somebody guilty of capital murder. Now, from what you said so far, let me ask you this, do you have conscientious or religious or moral scruples against the death penalty as a punishment in a proper case, or does that make sense?
A I have answered that. I don't like it.
Q We have to have a yes or no. See, you said you don't like it. Let me restate the question.
A Yes, I object to it.
Q Let me restate the question. Do you have conscientious, moral or religious scruples against the death penalty as a punishment in a proper case?
A I must have moral objections to it.
Q Well, you are the only one that knows. I have to ask these questions and you are the only one that can answer them and we have to have a yes or no. I'm not trying to

pin you down just for the sake of doing that, but when you say -- let me state this: It's hard to come in here and answer a lot of these questions. You can think about some of them for a week and not know exactly how you feel. But, unfortunately, we are put in the position of having to go ahead, get you to say one way or the other, and it's a pretty short period of time you have to think about it.

A I can't say I object, but I could give somebody the death penalty if there's no other way to make sure they are not back on the streets.

Q Okay. In that circumstance, you would agree with the death penalty then. In other words, our law is, a life sentence doesn't necessarily mean they would get parole. It doesn't mean they would. It's left up to the Board of Pardons and Paroles, their discretion whether someone gets back on the streets or not. That's one choice. The other is the death penalty. With that law to work with, do you have any conscientious or moral scruples against the death penalty as a punishment in a proper case?

A That would be a tremendous burden to carry around, to convict somebody of the death penalty.

Q I'm sure it would. Some people feel it's just wrong to take the life of one individual because he took the life of another. They look at it "Two wrongs don't make a

right. This man killed somebody, but it's wrong to kill him, even though he did something awful". A lot of people feel that way, but that's not the law at this particular time. So if you happen to feel that way, then, you happen to disagree with this particular law, and that's what we are trying to find out. If you do, we need to know about it now instead of after you get on the jury and get sworn in and swear to do something you can't conscientiously do. Then you are sitting back in the jury room deciding whether to vote to put someone to death when, going in, you don't agree with the law. So you have a choice, "Do I vote the oath I took or do I violate my conscience and live with that the rest of my life". The law says you don't have to be put in that dilemma of having to violate either the oath to yourself or the oath to the Court. If you go into it feeling like you disagree with that law, you can tell us about it now and you won't be put in that position.

On the other hand, if you feel like you could actually -- if the facts were properly presented, if you could actually go back there and vote to put somebody to death, you could be on the jury. We are not trying to get you to go one way or the other.

A How do you know until you have done it?

Q I guess you don't know to an absolute certainty. I guess

I'm trying to get you to put yourself in the position of feeling as close as you can to imagine what it would be like to actually be back there in that jury room deciding "I'm going to vote to what amounts to life or I'm going to vote for what amounts to the death penalty", and whether or not you could really do that.

A I have a feeling I couldn't.

Q I'm sorry?

A I have a feeling I couldn't do it.

Q Well, that's fine.

A I might change my mind if I heard a lot of bad evidence.

Q Well, I think it's probably safe to say that -- as much as I appreciate the thought you are giving to these questions and it's tough to come up with an answer here right now, I imagine, am I right?

A Right.

Q I can imagine it would be much, much, much tougher to come up with the answer as to whether this man lives or dies if you are on that jury. Would you agree with that?

A Right.

Q That's what you are faced with if you are on this jury, because I'm sure you probably will -- I can't say for certain, but my job is to evaluate the case and present the State's evidence and in my evaluation I feel we have enough evidence to warrant the death penalty. I will be

trying to convince the jury to vote for the death penalty. So I can assure you, that you will have to make that choice, either life imprisonment or death, if the Defendant is found guilty of capital murder. You are the only one that knows, at least you know better than anybody else as to whether you would actually be able to vote for what would amount to the death penalty.

Let me explain something a little further about the way the law works. Each trial is divided into two parts. The first part of each trial is to decide whether or not the Defendant is guilty. . Did he kill a person intentionally or not. In this case, did he kill a peace officer in the lawful discharge of his official duty and did he know he was a peace officer when he killed him. If you believed beyond a reasonable doubt that the Defendant did that, that he killed this peace officer, then you would say guilty. Of course, if you said you didn't believe it, you would say not guilty, then everybody would go home. If you said guilty, then that wouldn't have anything to do with punishment. Then you and the other jurors would proceed into the second part of the trial, we call it the punishment hearing. In that part of the trial, you would decide whether the Defendant got life or death as the punishment. Now, one would think probably that the jury would go back and vote life or

death, write down the word life or death as a verdict, or would that be what you would think ordinarily the logical way to do it?

A Yes.

Q That's not the way to do it. It's a little more complicated procedurally than that. It amounts to the same thing, but the way it's done, instead of saying life or death, the jury would answer some questions that the Judge would give you.

A He already told me.

Q He mentioned them to you?

A Right.

Q I will read them in a minute. But the way you answer those questions would directly determine whether the Defendant got life or death as a punishment. The Judge would have no choice but to sentence the Defendant to death of you answered those questions yes.

On the other hand, if the jury answered any of the questions no, then the Judge has no choice but to sentence the Defendant to life imprisonment. Now, the Judge would say the words "I sentence you to death", but it would be you who had caused that by your answers to those questions. See, the buck stops with you. In other words, it's the jury's responsibility by the way they answer those questions as to what happens to the Defendant. So

it would be on your conscience the rest of your life whichever way you vote. That's why this part of the trial is so important, because we are talking about something that could remain with you the rest of your life, whichever way you voted, and that's why I'm concerned at this time. You know, if you have these doubts about your agreeing with the death penalty or not at this point, then I can imagine how you are going to feel when you actually get back there and the State is asking you to vote for the death penalty and maybe eleven other jurors are and you are back there saying "Well, all the evidence indicates we ought to say yes to these questions, but I know if I say yes he's going to get the death penalty. I don't agree with the death penalty. If I say yes, I will have that to live with the rest of my life. Therefore, I just can't do it." You might come to that conclusion. The law says if you do feel that way, you don't have to go to that point to find out, you don't have to take that oath that says "I will follow the law" if you don't agree with it, if you feel like you couldn't actually follow through with the evidence all the way to the death penalty if necessary, because if you didn't tell us about it now and you went ahead and took that oath to follow the law, then you end up deciding "Do I violate my oath I took to follow the law or do I go ahead

and follow the law and violate my conscience and my feelings the rest of my life". You don't have to be put in that position if you feel that way. Have I kind've confused matters? Do you understand what I'm trying to get at?

A Yes. It puts me in a dilemma. I don't want to give up my responsibility as a citizen.

Q That's the point I'm trying to make.

A But, on the other hand, I really am not in favor of the death penalty. I really am not. Whether or not when it came down to it, like you say, what kind of struggle I would go through --

Q That's the dilemma the legislature and Judge said you don't have to put yourself in, because people who feel like you do, the law says you don't have to go on through with this and take an oath they couldn't live with. You are not less of a citizen because you don't agree with the death penalty. You are not less of a citizen if you tell us about it now. That's why we have this hearing here. That's why we have been talking with people for three weeks. It's not unusual at all. But it would not be fair to the State in this case, for instance, for you to get on the jury and then when we get to the end of the trial you say "I can't give the death penalty; no matter what they show me, I don't think it's right, I

don't agree with it, I'm not going to follow that law. I can't do it. My conscience won't let me". That's not fair to the State, just it wouldn't be fair to the Defendant if you got on the jury and said "I'm going to give him the death penalty no matter what, just automatically going to give him the death penalty". That's why we are trying to find out now, instead if you happen to get on the jury and not be able to follow the law.

A I haven't given you enough of an answer?

Q I guess not. Maybe you have. Let me go a little further with these questions as to how they are worded. As I mentioned, if you get to the punishment part of the trial, if you found somebody guilty in the first part of the trial of capital murder, then you get to the punishment part of the trial, you would have to decide whether the Defendant got life or death by answering these questions I was talking about. Did the Judge read you those questions earlier?

A He just told me the first two.

Q The first one is whether the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. In other words, did the Defendant do the killing deliberately or not. You have to say yes, he did, or no, he didn't.

Then you have to answer this next question, whether there is a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. You have to say yes, there is a probability he will do violent criminal acts again, or no, there isn't. That's pretty much of a value judgment there. You have to say yes or no to that. If you said yes, he did it deliberately, and yes, there is a probability he would do a violent criminal act again, you don't even have to believe he did murder again, maybe just beat somebody up, that's a criminal violent act. If you believe that, the law says you have to say yes to the question even if you didn't think he ought to get the death penalty. Even if you didn't think the particular crime he did this time was that bad or his past record was that bad and you didn't think he ought to get the death penalty, still, if you thought there was a probability he would do a violent criminal act again and he did this one deliberately, you would have to say yes, and then what would happen to the Defendant, do you remember, if you said yes to those two questions?

A Well, there is a third question. I don't know what it is. But if we said yes to all three, it's the death penalty.

Q The reason I didn't mention the third one, it says, if

raised by the evidence, whether the conduct of the Defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased, which is saying did the dead man provoke his own death; if he did, did the Defendant act reasonably in killing him anyway. So if you thought he didn't provoke his own death, you would say yes to the question, or if you thought he did provoke his own death but he still didn't act unreasonable in killing him, you still say yes. So if you said yes to all three of them, what would happen?

A The death penalty.

Q Automatically. Even if you didn't think he should get it, he would get it and it would be because you answered the questions yes. Could you actually sit on a jury and if you heard evidence to convince you to say yes, he did it deliberately, and yes, there is a probability he will do it again, and yes, the dead man did not provoke his own death, would you be able to say yes to the questions knowing the Defendant would get the death penalty? Or would it put you in such a dilemma that you wouldn't be able to take the oath of a juror? Either way, it doesn't matter to us, as long as you can be honest.

A I think it's very difficult to be honest without having gone through a trial, seeing what the evidence is. That's hard. I think I might be able to say yes to the questions

and rationalize to the point that I didn't sentence the person to death, but the law did.

Q Do you think you could actually rationalize that when it came down to it?

A I don't know, because I have never done it.

Q That's what I was trying to convey to you. In a few minutes, you are going to be sitting on the jury, then you are going to be sitting there having to say yes if the evidence proves it and by your answers you will be causing the man to be put to death. It's not me that's doing it. I'm trying to convince you to do it. I will take the responsibility for that, but I'm not the one that makes the decision. You would be. I don't care how they dressed it up, how many things they ask you here, if you say yes to those questions, he gets the death penalty and you will know that. The law says you must be told that. They even write it down here. They say the jury must know this, if they answer yes to the questions, they will get the death penalty, because they don't feel it's right for you to be sitting up there making those decisions if you couldn't follow that law.

A I don't believe in the death penalty. I would have to rationalize that I am not giving it to him, that I am not giving it to him, the State is.

Q But do you realize in reality, by the way you answer the

questions, that's the way you determine it?

A I don't approve of the law. Some day maybe there will be another law.

Q Right. There may be. But if you say you don't agree with it anyway --

A Well, I follow the fifty-five miles an hour limit. Well, sometimes I go sixty, I may go seventy, but I follow that law.

Q This is more important than a speeding situation. Then you are saying you would, if the State proved to you he deliberately did it and there was a probability he would commit criminal acts of violence again, you would say yes to the questions?

A I would rather not. I don't approve of the death penalty.

Q I understand that. When you say that, it's hard for me to imagine somebody that doesn't agree with the death penalty being able to say "I could do it anyway. That's such a heavy responsibility, it's hard for me to do it anyway".

A Maybe I wouldn't.

Q You what?

A Maybe I wouldn't.

Q Maybe you would not be able to? That's a dilemma I'm in now, because we have to try to get an answer, the best you can give us, that's either yes or no.

A You would rather I give you just a yes or no?
Q I don't know if I would or not, but I have to have that. I have to have either yes or no. It's not my idea. It's what the Judge says is the law and that the jurors have to be asked these questions beforehand. We have to get a definite answer one way or the other or we can't go on, and I'm not trying to get you to go one way or the other. It's just -- let me ask you this: Because you don't believe in the death penalty, don't think it's proper, do you feel like you would be more likely to answer these questions no when you are leaning that way from the start?
A Well, I imagine a psychologist would say that I probably would be more likely to answer them no.
Q I'm asking you what you think, not what some psychologist would think.
A I probably would, more than likely.
Q Is it true, you do have conscientious, moral scruples against the death penalty in a proper case?
A Yes.
Q Let me ask you this, this is an oath you would be required to take if you were on the jury, if you could conscientiously take this oath, and you may or may not feel like you would be able to, there's nothing wrong if you couldn't, but this is what the law says, before a person could be

on a jury like this, they are supposed to take this oath right here, if I can find it. You must state under oath that the mandatory penalty of death will not affect your deliberations on any issues of fact. In other words, the fact that you know the death penalty would result by answering these questions, would that affect the way you answer them? Did you follow that, or do you see that thought, that idea? What do you think about that? Do you feel like it would, or do you know?

A Well, I think it probably would depend on the evidence and how it affected me.

Q Sure. It always would to some extent, I'm sure. But, of course, the State would put on evidence and try to convince you to say yes to those questions so the Defendant would get the death penalty. But you have said that you don't agree with the death penalty. You would try to rationalize to answer the questions according to the evidence anyway, I think that's what you said earlier.

A Yes.

Q So I'm asking you, by doing that would you be leaning towards no answers to the questions because of your opposition to the death penalty?

A Probably.

Q Well, then, to me, it seems like it would be if not impossible, very difficult for you to swear that the

mandatory penalty of death would not affect your deliberations on any issue of fact in answering these questions. Would that be correct?

A Right.

Q Would it be true, that you could not take that oath, conscientiously take that oath then?

A I would rather somebody else took it.

Q Well, here again, what you would rather do is different than what you would do, and not because it's my idea, but we've got to get definite answers. In other words, if you feel you could not conscientiously take that oath, all you have to do is tell us. But so far, you haven't told me that. You just said you don't think you would like to or whatever. Do you see the difference?

Let me read it again. It says you would have to take an oath that the mandatory penalty of death would not affect your deliberations on any issue of fact in answering questions that the Judge might give you. From what you have told me, you won't be able to take that oath and swear to do that. Am I right or not?

A The more I think about it, I guess the more it seems you are right.

Q I'm not trying to trick you or anything. Sometimes I think jurors think we are trying to trick them. There are lots of words involved in all of this and it's hard

to put into words the thoughts we are having to go through, we are trying to put words to. See, that's what this comes down to. If you don't believe in the death penalty, you would be more likely to be leaning toward no answers to these questions to make sure the Defendant wouldn't get the death penalty; according to this, you couldn't take that oath because that might affect your answers.

A Wouldn't anybody who didn't believe in the death penalty do that?

Q Yes, I imagine they would. It would be very unusual for somebody to say they don't believe in the death penalty but they might answer these questions --

MR. BLAINE: It's unusual, but it happens. People do not have to agree with the law to serve on the jury. They have to just agree to uphold the law and they will follow it.

THE COURT: That is true. With that addition, the juror is properly advised.

Q (by Mr. Graham) I guess it's possible a juror can disagree with the death penalty but go ahead and answer these questions just down the line, that's technically possible, but I don't know if it's humanly possible, and at least to the point where it would affect the way you answer the questions, where you would be leaning towards

no answers instead of yes answers before you even heard any evidence, because you would naturally be opposed to the Defendant getting the death penalty. Do you feel like that would be accurate?

A Yes.

Q Let me ask you one other thing. Well, I read it to you, this question here that says is there a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society. That's asking you to look in the future and decide is there a probability the Defendant will do a violent criminal act again. Some people feel like that question is too nebulous, too unsure a question to ask anybody, because you could never be absolute certain somebody is going to do something again in the future. Would you agree with that or not? There's no way you can ever know to an absolute certainty what someone will do in the future.

A As a teacher, I see behavior repeated and repeated and repeated, so I would think I would be able to answer that question.

Q Well, that's kind've short-cutting my question. Maybe that's the ultimate question. But do you think that it would be possible to prove to an absolute certainty what somebody would do in the future?

A Right.

Q You do feel it would be possible to prove what they would probably do?

A Yes.

Q You do see the difference as to what somebody will do as opposed to what somebody will probably do? Because it's absolutely impossible to ever prove to an absolute certainty what somebody will do in the future, but we could prove it to a probability.

Well, that brings me back, for the last time, to this other question. But, as I understand you, because you are against the death penalty as a punishment, when it came to answering the punishment questions here, whether he deliberately and whether there is a probability he would do a violent criminal act again, you would shave it a little bit towards the no answers because you know if you say yes he would get the death penalty; is that right?

A Yes.

Q And you won't be able to take this oath that I read a minute ago where you would swear or you would have to swear if you did take the oath, that the mandatory penalty of death would not affect your answers on any issues of fact; is that right?

A I guess not. I guess I wouldn't.

THE COURT: I'm sorry?

MRS. HALL: I guess I wouldn't be able to take that oath.

Q (by Mr. Graham) Now, this may sound silly to you, but you said "I guess". That's not a definite answer. I need to have you say "I would not be able to take it" or "I would be able to".

A You can't give us overnight to think about this, can you? I'm having to dwell on this. Okay. I would not.

Q I appreciate you being honest, and the law doesn't, I don't think, contemplate that people that feel as strong as you do about the death penalty should be forced to go through and follow some law they don't agree with. That's why this part of the trial is set up like this.

MR. GRAHAM: We challenge, Your Honor.

MR. BLAINE: May I ask her a few questions?

THE COURT: Yes, sir.

EXAMINATION BY THE DEFENSE

Questions by Mr. Blaine:

Q Mrs. Hall, you are an educated woman. You have a lot of common sense and I'm sure you are reasonable. As you have been told many times today, you don't have to agree with the law. Of course, you don't have any right to disobey and ignore the law. You say you don't agree with the speeding law but you obey it. There's nothing

that says you are disqualified from serving on a jury because you don't agree with all the laws. The only thing is, can you take an oath that you will a true verdict render according to the law and the evidence. This question he ask, whether you can take an oath that the death penalty would not affect your deliberations, certainly, I guess that depends on what weight you want to put on that word "Affect". It would have to be a cold, cold person to take an oath, to say "It won't affect my deliberations. I don't care whether it's death or traffic tickets. I don't think the law anticipates that it's unreasonable -- "

MR. GRAHAM: I have to object to that. Whether we think it's unreasonable or not, that's what the law is, that's the oath people have to take.

THE COURT: He's entitled to search the juror's mind as to her evaluation of that law.

Q (by Mr. Blaine) I think what it means by that law is would the fact you are opposed to the death penalty cause you to answer one of those questions one way or the other directly against what the evidence proves to you just because you don't want to impose the death penalty. The first question asks whether or not the act that caused the death was done deliberately. If they convinced you beyond a reasonable doubt that it was,

you, in your own mind, are convinced in your own mind the answer should be yes, would you answer yes, or would you go and contrary to your oath answer no because you don't want to see the death penalty imposed; that's what it means. Certainly, the fact death is the ultimate thing, certainly is going to affect your deliberations. You are going to look into it more deeply and be convinced of what you are doing, I would imagine. But would you answer the questions no regardless of what the evidence convinced you?

A I don't know how powerful your subconscious is on that answer.

Q Your subconscious is not what we are talking about. We are talking about your conscious mind. Would you conscientiously answer it no, although it were proven the answer should be yes?

A You might not ever be able to be convinced yes.

Q That's not the question. Would you, in essence, say no as to whether or not it affects your deliberations?

A I'm saying it could keep you from ever being convinced.

Q I'm saying if they did convince you the answer should be yes, would you then still answer it no because you don't believe in the death penalty? I'm not talking about the weight of their evidence. If they didn't convince you to say yes, you are not disobeying your oath.

A I think somebody with real strong objections to the death penalty could never be convinced to answer yes, would always say there is a doubt.

Q We don't base these things on doubt. It's based on reasonable doubt. Certainly, there's always some doubt.

A They would push it to that, it's not reasonable.

Q Reasonable doubt will not be defined to you. You will have to make your own mind up as to what to you constitutes reasonable doubt.

Now, to go back again to the question, would you, if you were on the jury and they had proven to you beyond a reasonable doubt the questions should be answered yes, would you answer it yes, or would you answer it no because you would not want to see the death penalty imposed, although you believed you were convinced it should be answered yes?

A I don't know, because I have never sat on a jury and I don't know how overwhelming the evidence is and I don't know how it affects you.

Q I realize you haven't heard the evidence. I'm talking about if you are convinced — if they haven't convinced you of it, certainly you haven't violated any oath by saying no, because as a member of the jury you would have to be convinced beyond a reasonable doubt that it should be answered yes.

A I guess I would answer yes.
Q Again, you guess. I know you probably meant to say yes, and I realize you haven't been there.
A I think it's real important if somebody does not believe in the death penalty, the way that they will look at the evidence is different than somebody who does and my idea of reasonable doubt --
Q Let me put it this way. We on this side definitely believe that people who get up without hesitancy, say "We believe in the death penalty", we think they are anxious to give it. They are more inclined to give it. Of course, the law doesn't say that's what kind of jury we should have. We should have a jury of a cross-section of the people. It doesn't say you are disqualified to serve just because you don't believe in one aspect of the law. The only issue is, can you follow the law?
A I don't want to ever give the death penalty.
Q I realize that and it doesn't say you can't serve on a jury just because you don't want to do it. The only thing is, can you truthfully answer the questions according to the evidence, or would you answer contrary just because you are opposed to the death penalty?
A Like I said, I think I would make the evidence doubtful.
Q Regardless of what they proved?
A Probably looking for a way out.

Q I don't think there's anything wrong with that. That means you are looking the evidence over. But would you still vote contrary to what the evidence proved to you?

A I don't know. I would rather serve on some other kind of jury that doesn't involve the death penalty. Let me come back tomorrow, go back in that little room, I really will, I'm not trying to get out of being on the jury.

Q I can see you are not, but you are conscientious. That's what we want on a jury, someone that is conscientious. Of course, each side has to have someone that will follow the law. It's not right for the Defendant to get people on the jury who will hide in some biases and favor the death penalty and kind've want to give it. See, when you qualify twelve people who believe in the death penalty, we have a strike against us to begin with. So there's nothing that says because you oppose it, you can't serve on a jury. In fact, in your own mind, you are going to look over the evidence carefully. That's what you are supposed to do. Would you vote according to what the evidence proved to you; if they prove to you the answers should be yes, would you answer yes, or would you answer no, contrary to what the evidence proved?

A I don't know.

Q Can you give some definite answer, yes or no?

A Haven't I answered it?

Q I think you said "I don't know". It boils down, and the same theory, you said you wished you could drive seventy miles per hour, but you don't do it because the law says you are not supposed to. You obey that law and you follow this law even though you don't agree with it.

A I'd rather not follow it if there's somebody else that can be on the jury. There are lots of people that want to be on it.

Q As I say, on this side of the table it makes us a little scared of those that want to be on it.

A But is it fair to the State? Of course, all of us are subject to those subconscious things. Everyone is.

Q But the main question is, I don't think it would be subconscious if they convinced you the answer should be yes. If you still vote no knowing they have convinced you it should be yes, certainly, you have violated the oath you have taken. What your subconscious would do is something else.

A It would keep me from ever being convinced.

Q What you in your own mind might determine is reasonable doubt, that goes to the weight. Different people take different weights of evidence to be convinced of things.

Now, to go back again, can you give me an answer to the question, if you were on the jury, if you were convinced in your own mind you should answer that question

yes, the weight of the evidence had proven that to you beyond any reasonable doubt, would you answer yes according to your oath, or would you ignore your oath and answer no because you didn't want to see the death penalty imposed?

A I don't know how to answer that. I don't think I can give an honest answer to that.

Q When you first got up there, I think you answered the questions by saying -- I don't remember the terminology, but you thought you had enough character that you could.

A I would carry out the law I said.

Q Yes, and that's it, I think is the answer to it if you meant that.

A I don't know.

Q I know it's difficult for anyone to say what they would do under a certain set of circumstances if they haven't been under those circumstances. Of course, you have to anticipate. If you think you can do it, say yes; if you don't think you can do it, say no.

A I think I lean pretty much towards -- I'm not going to give you a yes or no. Well, I feel that I am really opposed to the death penalty to the point I would have a terrible time answering the first question, which wouldn't make me a fair juror.

MR. GRAHAM: Your Honor, excuse me.

We re-urge the challenge, because she said several times she couldn't take that oath.

EXAMINATION BY THE COURT

Questions by the Court:

Q Mrs. Hall, you understand the facts are not the responsibility of the jury. They just listen passively to the testimony and evidence that's proven and report their conclusions of what those facts are, so that you are not the one that's making the facts. You are only reflecting what proof has been made. That's what they are talking about here, is what proof has been made. You know if you return a verdict of guilty, they have made proof to the jury of the accusation, so you are reflecting that.

Now, if they make proof on these questions that would be submitted on the punishment feature, then you should reflect only what proof they have made. By answering those questions yes, the State has proved beyond a reasonable doubt the act was done deliberately, not be influenced by what your subconscious or whatever you choose to define it as being, or be influenced by anything but the facts that are presented from the witness stand. That's what should guide you as a juror. If they prove beyond a reasonable doubt that the act was done deliberately, you should say yes. If they prove beyond a reasonable doubt that he would probably commit

criminal acts of violence in the future, you should say yes. Now, their question is, do you have such opposition to the result, and you are entitled to know what the result is, the death penalty, that that's going to affect how you answer those fact-questions?

A Yes, because I do think that it's impossible for human beings —

Q We are not talking about the philosophy of it. We are talking about what Mrs. Hall thinks in her mind right now before she's heard any of the facts. Is your conscience such, your persuasion, religious, morals, whatever it is that makes up your own thinking, is that going to prevent you from saying yes to the questions if they prove beyond a reasonable doubt the questions should be answered yes simply because you know what the Court is going to do with your two yes answers or three yes answers? What is going to guide you? The evidence that you heard, because you are under oath to follow it, or your conscience because you know what the result is going to be? That's the ultimate question here.

A I think my conscience.

Q Well, you know it's going to affect you; in that event, you would not ever answer yes?

A I don't know, because I have never done it.

Q We realize that, and that's the reason we are having to

press closely. You have to examine your own conscious.

A I wish I would have known it last night so I could have thought of it.

Q You don't have that luxury, Mrs. Hall.

I sustain the challenge. Thank you for your answers, Mrs. Hall.

DIANE LESKE SMITH

EXAMINATION BY THE COURT

Questions by the Court:

Q That's Diane Leske Smith, 1633 Bayram Drive?

A Yes, sir.

Q Is this an address in Harris County, Texas?

A Yes, sir.

Q Mrs. Smith, you understand we are in the process of selecting a jury in the case of the State of Texas vs. Charles William Bass seated here at counsel table with his Attorney, Mr. Victor Blaine, and the District Attorney representing the State, Mr. Bert Graham, and not here with us today is Mr. John Holleman. Are you acquainted with any of those people?

A No, sir.

Q Do you think you know anything about the facts in this case?

A No.

Q Do you know what we are talking about?

Office Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 82-6915

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

CHARLES WILLIAM BASS,

Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS CORRECTLY APPLIED WAINWRIGHT V. SYKES AND ENGLE V. ISAAC IN HOLDING THAT PETITIONER'S CLEAR PROCEDURAL DEFAULT UNDER STATE LAW BARRED FEDERAL HABEAS CORPUS REVIEW OF HIS CLAIM THAT A VENIREMAN WAS ERRONEOUSLY EXCLUDED.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, by and through his attorney, the Attorney General of Texas, and files this his brief in opposition.

OPINION BELOW

The opinion of the court below in Bass v. Estelle, 696 F.2d 1154 (5th Cir. 1983) and the opinion of that court in denying Petitioner's motion for rehearing are appended to Petitioner's petition at Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on February 4, 1983. Petitioner's timely filed motion for rehearing was denied on May

19, 1983. Petitioner seeks to invoke the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner bases his claims upon the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner's statement of the case essentially is correct.

SUMMARY OF ARGUMENT

This case presents only the application of the well settled federal habeas doctrine of waiver to the particular facts in this case. State law effective at the time of Petitioner's trial required that he voice an objection to the allegedly erroneous exclusion of a venireman pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). His failure to do so precludes federal habeas review of this claim, absent a showing of cause and prejudice.

The alleged futility of making such objection before the state courts is insufficient to establish "cause." Thus, the Court of Appeals correctly held that this claim was waived in federal habeas review.

Petitioner's assertion that recent state law would excuse his procedural default is based upon a misreading of that law, as the Court of Appeals found in denying his petition for rehearing. Finally, that the state courts occasionally overlook a procedural default does not support Petitioner's argument that the default must be excused in his case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. Further, this case only presents the application of well settled law of procedural default to the particular facts involved in this case. Thus, this Court should decline to review this case.

II.

THE COURT BELOW CORRECTLY APPLIED WAINWRIGHT V. SYKES AND ENGLE V. ISAAC IN HOLDING THAT PETITIONER'S CLEAR PROCEDURAL DEFAULT PURSUANT TO STATE LAW BARRED FEDERAL HABEAS REVIEW OF HIS CLAIM

The Court of Appeals found that Petitioner's failure to voice any objection to the exclusion of venireman Marian Hall from his 1980 capital murder trial barred federal habeas review of that ground pursuant to Wainwright v. Sykes, 433 U.S. 71 (1977) and Engle v. Isaac, 456 U.S. 107 (1982). That court held:

> It is settled law that such a state prisoner as Bass, barred by procedural default from raising a constitutional claim on direct appeal, cannot do so in a federal habeas proceeding without demonstrating both cause for the default and actual prejudice resulting from it. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Texas procedure requires a contemporaneous objection to the exclusion of a veniremen on pain of waiver of the point. Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1610, 51 L.Ed.2d 811 (1977). None was made by Bass to the dismissal of Mrs. Hall from the venire.
>
> * * *
>
> Sykes and Engle, however, recognize that waiver can be avoided by a showing of "cause" and "prejudice"; and Bass argues that "cause" existed in his case. This is said to be so because at the time of his trial the state court system of Texas failed properly to understand and apply Witherspoon and hence any objection would have been meaningless. A very similar suggestion was, however, squarely rejected in Engle. Witherspoon v. Illinois, decided in 1968, long antedated petitioner's trial in 1980, so that the

> basis of the contentions successfully made in Adams v. Texas, 448 U.S. 38, 39, 100 S.Ct. 2521, 2523, 65 L.Ed.2d 581 (1980) -- the same contentions that counsel alludes to here -- was apparent and available. Petitioner's contention to us therefore goes down before the specific language of Engle:
>
> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.
>
> 456 U.S. at 134, 102 S.Ct. at 1574, 71 L.Ed.2d at 804.
>
> We hold that petitioner's Witherspoon objection to the discharge of Mrs. Hall was waived. An objection to the discharge of a venireman is little to require; to hold otherwise would open the discharge of every venireman, objected to or not, in such cases as this -- where the venire examination consumed over two-thirds of the 3000-page record -- to examination on appeal. We cannot countenance such ambushing state processes.

696 F.2d at 1156-1158 (footnote omitted). That Court was correct in so holding.

In Wainwright v. Sykes, 433 U.S. 72 (1977) and Francis v. Henderson, 425 U.S. 536 (1976), this Court recognized the valid state interests in adopting procedural rules requiring defendants to make contemporaneous objections to objectionable matters at trial. Absent compliance with these state procedural requirements, federal habeas review is precluded. In Davis v. United States, 411 U.S. 233 (1973), this Court held that absent a requirement that the parties make contemporaneous objections in order to preserve error, they would have little incentive to make such objection and:

> [s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal with the thoughts that if these hopes did not materialize, the claim could be used to upset an otherwise valid conviction at the time when representation might well be difficult.

411 U.S. at 241. See also, Estelle v. Williams, 425 U.S. 501 (1976). This is especially true where, as here, the asserted error involves jury selection proceedings where there are a

multitude of tactical and strategic reasons why counsel specifically would not want to object to the exclusion of a prospective juror. Jury selection, unlike many other trial proceedings, is solely a matter of trial tactics and strategy, involving decisions of counsel which cannot be second-guessed years later in federal habeas proceedings.

Petitioner seeks to circumvent the requirement of Wainwright v. Sykes, however, by asserting that an objection to the exclusion of the venireman would have been "futile" under state law.

In Engle v. Isaac, supra, this Court held that in federal habeas review, the futility of the state defendant raising an objection before the state courts cannot constitute "cause" for the failure to object. In Isaac, the state defendants pursuing federal habeas corpus relief had failed to voice objections, as required by state procedural law, to erroneous jury instructions. They sought to excuse their failure to object, by arguing that (1) at the time of their trials, the defects in the jury instructions had not been established, and (2) the state courts consistently had rejected such attacks upon the same jury instructions, so that any objections made would have been futile gestures.

In holding that these arguments were insufficient to establish "cause" for the failure to object under the test of Wainwright v. Sykes, this Court stated:

> . . .the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

456 U.S. at 130.

The habeas petitioner then urged this Court to find that, because the defects in the state jury instructions had not yet been established at the time of their trials, this excused their

failure to object. This argument was rejected also, however, because the "later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair." 456 U.S. at 131. This Court found that the claims raised by the habeas petitioners had been the subject of federal constitutional litigation both in federal and state courts, and held that:

> [i]n light of this activity, we cannot say that respondents [the habeas petitioners] lacked the tools to construct their constitutional claim. . . Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness or the objection as cause for a procedural default.

456 U.S. at 133-34. (emphasis added)(footnotes omitted).

Thus, that the state court may have been hostile to the argument cannot excuse the procedural default under Wainwright v. Sykes, so long as the defendant has available to him the "tools" to construct the constitutional claim. This, Petitioner certainly had in May, 1980. See, Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc, 626 F.2d 396 (1980). Thus, the instant case clearly falls within the ambit of Sykes and Isaac. The court below was correct in holding that Petitioner's failure to object to the exclusion of venireman Hall precludes federal habeas review in the district court.

Additionally, Petitioner asserts that because sometimes the state appellate court will excuse a procedural default and reach the merits of a claim not objected to at trial, federal habeas courts should decline to enforce the state's contemporaneous objection requirement in all circumstances. Such a proposition

recently was rejected by the court below in Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), wherein that court noted:

> . . . we do not mean to suggest that past excuse of a default in another case allows a federal court to excuse a default in a case where the state courts have not. Instead, we have looked to [state] law to determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g., County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979).

686 F.2d at 314. Accord, Engle v. Isaac, 456 U.S. at 135, n.44. Thus, that the state court on occasion has overlooked a procedural default provides no support for Petitioner's argument in the instant case, where it did not. Petitioner's assertion that the holding of the court below is inconsistent with Barr v. City of Columbia, 378 U.S. 146 (1964) must fail for two reasons. First, the opinion of the state appellate court did not, as Petitioner asserts, ignore its own procedural default rules. See, Bass v. State, 662 S.W.2d at 109. Second, the authority upon which Petitioner relies was decided well before Sykes and Isaac, and, therefore, to any extent in which these cases are inconsistent with Barr, that language in Barr must be considered overruled.

Finally, Petitioner's arguments that the state modified its contemporaneous objection rule to the extent that his procedural default now would be "excused" wholly misconstrues existing state law. The court below correctly held:

> The decisions relied on by Bass do not go so far as he would like. Examination of them makes plain that their rule is a narrower one: that such a mere general objection or exception to the dismissal of a juror as would normally be deemed under Texas law to present nothing for review will be deemed sufficient in instances occurring before the handing down of Adams, not that no objection whatever is required. In each of the three decisions an objection of some sort was made, and in each the rule as stated was applied.
>
> * * *
>
> We thererore conclude that the Texas rule, while excusing the generality of an objection in such circumstances as these, requires some

> expression of dissent, however vague, from the dismissal of a juror before it may be complained of on appeal.

705 F.2d at 122 (footnote omitted). Petitioner's argument is meritless.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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